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No. 07-

IN THE

Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC., AND
GENERAL ELECTRIC CAPITAL CORPORATION,
Petitioners,

v.

NEWCAL INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff can define a valid antitrust market or submarket as the class of customers who have term contracts with the plaintiff's business rival.

2. Whether a plaintiff can satisfy RICO's proximate-cause requirement by alleging that a business rival defrauded its own customers when those customers—who are not parties—are the ostensible victims of the alleged fraud.

3. Whether, to satisfy RICO's "enterprise" requirement, a plaintiff can allege an "association in fact" without alleging that this "association" had any discrete organizational structure.

4. Whether a plaintiff may invoke the Declaratory Judgment Act to void contracts between the plaintiff's business rival and the rival's customers when those customers are not parties to the suit.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were:

NewCal Industries, Inc.; CPO, Ltd.; Pinnacle Document Systems, Inc.; and Kearns Business Solution, Inc. (plaintiffs-appellants); and

IKON Office Solutions, Inc., and General Electric Capital Corporation (defendants-appellees).

RULE 29.6 STATEMENT

No publicly held corporation owns 10% or more of Petitioner IKON's stock. All of General Electric Capital Corporation's outstanding common stock is owned by General Electric Capital Services, Inc. All of the common stock of General Electric Capital Services, Inc., is owned, directly or indirectly, by General Electric Company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The court of appeals' opinion is reported at 513 F.3d 1038 (9th Cir. 2008) and is reproduced at App. 1a-31a. The district court's opinions are unpublished and are reproduced at App. 35a-43a, 45a-67a.

JURISDICTION

The court of appeals entered its judgment on January 23, 2008. App. 1a. A timely petition for rehearing was denied on March 7, 2008. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, are set forth at App. 69a. The Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq.*, is set forth at App. 70a-75a. The Declaratory

Judgment Act, 28 U.S.C. § 2201, is set forth at App. 76a.

STATEMENT

The Ninth Circuit's decision below entitles any corporate plaintiff to bring federal antitrust and racketeering claims against a business rival merely by alleging that the rival deceived its customers (who are not parties to the suit) into accepting contractual commitments that impede the plaintiff's efforts to win the customers' business. That holding is as far-reaching as it is wrong, and it conflicts in several independent respects with the decisions of other courts of appeals.

First, relying on *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Ninth Circuit held that a plaintiff may sue a rival under the Sherman Act, even though the defendant has no market power under any conventional definition, on the theory that the defendant fraudulently enticed its customers to extend their term contracts with it. The court reached that result by defining the relevant market not in terms of interchangeable *products* or *services*, but much more narrowly in terms of the defendant's own *customer base*. Under the Ninth Circuit's reasoning, even if Company X is one of twenty equal competitors in the market for providing some service, the relevant market for antitrust purposes can be the market for providing those services *to the contractually bound customers of Company X*—a market in which Company X has "monopoly" power by definition.

In so ruling, the Ninth Circuit created a sharp conflict with several other courts of appeals. For example, the Third Circuit has held—correctly—that a "court making a relevant market determination looks not to the *contractual* restraints assumed by a particular

plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (emphasis added). The Ninth Circuit's contrary approach inappropriately "turn[s] antitrust into an engine for resolving contract disputes generally" and a "substitute for the law of fraud, misrepresentation, or unfair dealing." Areeda & Hovenkamp, *Antitrust Law* ¶ 519a, at 192 (3d ed. 2007). Worse, that approach converts what should be ordinary common law disputes between a company *and its customers* into treble-damages antitrust disputes between the company *and its competitors*.

Second, the Ninth Circuit held that, in these same circumstances, a business competitor may sue the defendant company for treble damages under RICO as well—again, on the basis of alleged acts by the company *against its customers* (who are not parties to the suit) rather than against the plaintiff competitor. That position contradicts the holding of this Court and several courts of appeals that, for standing purposes, a "RICO plaintiff cannot circumvent the [statutory] proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006). Inexplicably, the Ninth Circuit did not even cite *Anza*.

Third, the Ninth Circuit compounded that error, and deepened yet another circuit split, by holding that a plaintiff can state a RICO claim without alleging any "separate organizational structure" for the purported RICO "enterprise." That holding conflicts with the decisions of several other courts of appeals. Finally, in perhaps its strangest holding of all, the Ninth Circuit

converted the Declaratory Judgment Act into a surrogate for the Rule 23 class action mechanism by holding that a corporate plaintiff may seek to void thousands of contracts between a business rival and that rival's customers—even though, again, those customers are not parties to the suit.

In short, the Ninth Circuit's decision is irreconcilable in multiple respects with the decisions of this Court and other courts of appeals. It also has troubling and far-reaching implications for any company that seeks to capitalize on relationships with its contractual partners and does business in the Ninth Circuit. This Court's review is amply warranted.

A. NewCal's Claims

Petitioner IKON, respondent NewCal, and many other companies compete to provide copier equipment, parts, and maintenance services to sophisticated commercial customers. App. 2a; 36a. These companies do not generally manufacture copier equipment themselves. Instead, they purchase such equipment from a wide range of independent manufacturers and sell it to their customers or arrange for it to be leased to them. The equipment manufacturers—Xerox, Ricoh, Canon, and others—sell equipment both to independent distributors such as IKON and also directly to end users (in competition with the independent distributors). It is undisputed that the equipment-supply and maintenance market in which IKON participates is highly competitive. App. 13a.

Customers in this market enter into non-exclusive term contracts—generally for a term of five years—with one or more equipment-supply companies. App. 36a. As a given customer's contract approaches the end of its term, rival companies often compete to win the

customer's business from the incumbent. To that end, a rival may offer to cover the "buy-out" or "lease-end" charge that the customer would otherwise have to pay the incumbent in order to exit the contract before its scheduled termination. App. 36a-37a. The amount of that charge increases with the amount of time left in the contractual term.

For their part, incumbents try to maintain their existing business by giving their customers incentives to enter into extended ("flex") contracts. In this case, NewCal and several other equipment-supply companies (collectively, "NewCal") allege that IKON defrauded its customers by tricking them into extending the terms of their contracts. App. 37a. None of these allegedly defrauded customers joined NewCal's complaint, and none is a party to this case. Nevertheless, NewCal claims that IKON's supposed "fraud" harmed NewCal and IKON's other rivals by making it more difficult and costly to win the business of IKON's existing customers. That allegation of indirect harm is the basis for the antitrust and RICO claims at issue here.[1]

1. *Antitrust claims.* NewCal asserts a variety of antitrust theories under Sections 1 and 2 of the Sherman Act, including unlawful monopolization, exclusive dealing, and tying. App. 19a-20a. To state a claim under any of these theories, NewCal had to define, as a threshold matter, the "markets" in which it alleges that IKON possessed and abused market power. *See, e.g.*, *Queen City*, 124 F.3d at 436-437; *see also* App. 5a; 51a-

[1] NewCal has also named co-petitioner General Electric Capital Corporation ("GE")—which had purchased some of IKON's existing contracts—as a codefendant and co-conspirator. For simplicity, we refer to IKON and GE in the aggregate as "IKON."

52a. For antitrust purposes, a "market" is "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States* v. *E.I. Du-Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

NewCal proposed four alternative market definitions. Two of them—"copier equipment" and "copier service for Canon and Ricoh brand copier equipment"—are potentially valid definitions under existing law. But as the Ninth Circuit recognized, these definitions could not "support Newcal's claims because Newcal nowhere alleged that IKON holds market power in the nationwide market for copier equipment leases or in the nationwide market for Canon and Ricoh-brand copier equipment service." App. 7a.

NewCal thus proposed the alternative market definitions at the core of this case: "replacement copier equipment for IKON and GE customers *with flexed IKON contracts*" and "copier service for IKON and GE customers *with flexed IKON contracts*." App. 6a-7a (emphasis added; some capitalization altered).[2] In each case, NewCal sought to define the relevant market in terms of customers who already had contractual obligations to IKON. And NewCal contended that IKON had harmed competition within this "market" by improp-

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[2] NewCal and the Ninth Circuit referred to these two constructs sometimes as "markets" and sometimes as "submarkets." That terminological distinction has no analytical significance. Because "the identification of a submarket is in principle no different than the identification of a relevant market, . . . nothing would be lost by deleting the word 'submarket' from the antitrust lexicon." Areeda & Hovenkamp, *supra*, ¶ 533, at 257 (internal quotation omitted). *See* pp. 22-23, *infra*. We therefore refer to these simply as NewCal's proposed "markets."

erly extending its customers' contracts and thereby frustrating the efforts of rivals to win their business. NewCal labeled this type of conduct "installed base opportunism." C.A. E.R. 226 ¶ 83. Significantly, NewCal has not alleged that any factor *other than* the contractual commitments of IKON's customers makes it difficult for those customers to switch to another supplier.

2. *RICO claims.* NewCal separately alleged that IKON violated RICO by engaging in a "pattern of racketeering activity." To state a RICO claim under 18 U.S.C. § 1262(c), a plaintiff must allege, among other things, "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). As to the third and fourth prongs, NewCal alleged, as predicate acts, that IKON had used the mail and wires to "defraud" its customers into extending their IKON contracts. App. 57a. NewCal did not argue that IKON had defrauded *it* or any other business rival. Instead, NewCal claimed that, by defrauding its own customers into extending their contracts, IKON made it more difficult and costly for NewCal to win the business of those customers for itself. App. 26a; *see* C.A. E.R. 250 ¶ 159.

As to the second *Sedima* prong, NewCal did not allege that IKON itself is an "enterprise"; indeed, it alleged that "[t]he defendants, IKON and GE, are persons distinct from the enterprise[.]" C.A. E.R. 241 ¶ 145. NewCal instead defined the "enterprise" as a nebulous "association in fact" that encompasses IKON, various equipment manufacturers, various financing companies, and "entities which assist in administering the IKON Contracts," including two law firms. *Id.* at 241-242 ¶ 146. NewCal noted that many of these entities are bound through bilateral contractual relationships in the ordinary course of business, *id.* at 242 ¶ 147,

but it did not describe any coherent structure for the allegedly criminal "association in fact," such as a system of authority or a decisionmaking apparatus.

3. *Declaratory Judgment Act.* Invoking the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, NewCal also sought a judicial declaration that thousands of contracts between IKON and its customers are void and unenforceable. App. 28a; IKON C.A. Br. 4-5. As noted, none of those customers is a party to this suit.[3]

B. The District Court's Orders

1. IKON moved to dismiss NewCal's complaint for failure to state a valid claim. In its initial order, the district court granted that motion but allowed NewCal to replead all of its claims, except for the claim under the Declaratory Judgment Act. App. 62a-63a. As to that claim, the district court held that (i) "NewCal lacks standing to seek declaratory judgment regarding the rights and obligations of customers subject to IKON Contracts" and (ii) prudential considerations would justify denying the requested relief in any event, given

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[3] NewCal also claimed that IKON had violated the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), by making false and misleading statements in its promotional activities. The district court dismissed that claim for failure to allege actionable "false statements," but the court of appeals reversed and "remanded for evidentiary development." App. 25a. Because these Lanham Act issues are fact-bound, this petition does not challenge the Ninth Circuit's disposition of them. Nonetheless, this Court routinely grants certiorari to consider antitrust and RICO claims at interlocutory stages of litigation, and it should do so here as well. *See* note 10, *infra*.

that "the IKON customers under such contracts are not parties to this case." App. 60a-62a.

As the district court had permitted, NewCal filed an amended complaint, and IKON moved again to dismiss all claims. The district court granted the motion, this time with prejudice.

The district court first held that NewCal's antitrust claims were invalid because IKON "has no . . . market power" in any properly defined market. App. 39a. As the court observed, the IKON-specific "markets" NewCal proposed to get around this problem were "defined solely in terms of IKON customers that have contracts with IKON." App. 38a. Relying on the Third Circuit's decision in *Queen City*, 124 F.3d at 438, the district court held that such contractual relationships cannot serve as a basis for defining a valid antitrust market. App. 38a-39a; *see also* App. 38a ("power under a contract does not create market power in the antitrust sense"), 52a-56a (preliminary district court order).[4] The court thus concluded that "[a]ny hypothetical claims that might arise from the alleged injuries of IKON customers in this case would be problems of con-

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[4] In *Queen City*, franchisees of Domino's Pizza had contractually committed to purchase certain supplies exclusively from Domino's or an "approved" supplier. The franchisees alleged that Domino's had market power in what they characterized as a "market" for Domino's-approved supplies, and they alleged that Domino's had abused that market power through anticompetitive practices designed to crush the franchisees' efforts to purchase from independent suppliers. The Third Circuit rejected plaintiffs' claim because it rested on an inappropriately contract-based market definition and because Domino's lacked any market power in the properly defined market for pizza supplies generally. 124 F.3d at 437-441.

tract law and negotiation, not antitrust problems." App. 39a.

The district court rejected NewCal's argument that this Court's decision in *Kodak* requires a contrary result. In *Kodak*, the Court held that it can sometimes be appropriate to define an antitrust product market in terms of a single brand: in that case, the "aftermarket" for providing parts and service to users of Kodak-brand copying equipment. *See* 504 U.S. at 481-482. The district court explained, however, that "the relevant product market [in *Kodak*] was not defined in terms of consumers who had *contracts* with Kodak, but rather in terms of the service and replacement parts required by Kodak equipment owners and controlled by Kodak." App. 39a (emphasis added). Here, in contrast, NewCal's market definition *is* explicitly framed in terms of customers who have contracts with IKON.

The district court also dismissed NewCal's RICO claim on the ground that a RICO plaintiff must "show that his injury was proximately caused by the defendant's wrong," and "[t]his requires . . . a direct relationship between the injury asserted and the injurious conduct alleged." App. 41a-42a. As the court explained, "[c]ourts regularly dismiss fraud-based RICO claims in which the alleged misrepresentations were directed at third parties rather than at the plaintiff," and here "NewCal is not the proper party to assert this RICO claim." *Id.* (*citing Byrne* v. *Nezhat*, 261 F.3d 1075, 1110 (11th Cir. 2001); *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995)).

C. The Ninth Circuit's Decision

The Ninth Circuit reversed and reinstated all claims.

1. On the antitrust claim, the court described its task as "determining whether this case is more like *Queen City Pizza* . . . or more like *Eastman Kodak*." App. 13a. The Ninth Circuit did not contest that, as the district court had found, this case is more like *Queen City* in at least one important respect. In *Queen City*, as here, the plaintiff sought to define the market in terms of *contractual relationships*—specifically, products used by pizza stores that had entered into franchise agreements with Domino's. 124 F.3d at 437. In *Kodak*, by contrast, the market definition at issue did not refer to any contractual relationships between Eastman Kodak and its customers. Instead, it defined the relevant markets as the provision of parts and services to customers with Kodak machines, whether they had contracts with Kodak or not.[5]

The Ninth Circuit nonetheless found that "Newcal's allegations are more like the allegations at issue in *Eastman Kodak* than those at issue in *Queen City Pizza*," and it concluded that those allegations state a cognizable antitrust claim. App. 17a-18a. The Ninth Circuit reasoned that the pizza franchisees in *Queen City* "knowingly and voluntarily gave" their contractual consent to purchase products on the defendant's terms, whereas here NewCal alleges that IKON defrauded its customers into extending their contracts unwittingly. App. 13a, 16a. The court added: "The al-

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[5] Kodak was accused of leveraging its monopoly over replacement parts for those Kodak machines to suppress competition in the market for servicing them. *See* 504 U.S. at 464-465. No analogous claim is presented here: IKON does not manufacture the equipment, replacement parts, or supplies that it provides to its customers, and that is why NewCal advocated a market definition based on contractual relationships rather than products.

legation here is that IKON is . . . exploiting its unique position—its unique contractual relationship—to gain monopoly power in a derivative aftermarket" for the provision of copier equipment, parts, and services to customers that have such "contractual relationship[s]" with IKON. App. 15a. And the court concluded that "Newcal's complaint sufficiently alleges that IKON customers constitute" a contractually defined market within which IKON has "market power." App. 17a. The court rejected IKON's argument, based on *Queen City* and other cases, that antitrust markets must be defined by reference to products rather than "contractual relationship[s]." App. 17a; *see* IKON C.A. Br. 18-30.

2. The Ninth Circuit also reversed the district court's dismissal of NewCal's RICO claim. First, the court concluded that a corporate plaintiff can satisfy RICO's proximate-cause requirement, and thus establish standing to sue a business rival under that statute, by alleging that the rival "defrauded" its own (non-party) customers into extending their contracts. App. 27a. The court concluded that satisfaction of the proximate-cause requirement in this context must be assessed on a case-by-case basis, and it therefore remanded for further factual development. *Id.* The Ninth Circuit did not cite, much less grapple with, this Court's recent holding that a "RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Anza*, 547 U.S. at 460.[6]

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[6] *Anza* was decided on June 5, 2006, several months after the parties here had filed their appellate briefs. On March 30, 2007,

The Ninth Circuit further rejected IKON's alternative basis for affirming the district court's dismissal of the RICO claim: namely, NewCal's failure to allege any meaningful organizational structure for the alleged "enterprise." The Ninth Circuit noted simply that "[w]e recently held in *Odom* v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), that RICO's enterprise element does not require the allegation or proof of any separate organizational structure." App. 28a. As the Ninth Circuit had acknowledged in *Odom*, this is the subject of a longstanding circuit conflict that involves almost all of the federal courts of appeals. *See* 486 F.3d at 549-52.

3. Finally, the Ninth Circuit reinstated NewCal's Declaratory Judgment Act claim seeking invalidation of thousands of contracts between IKON and its non-party customers. The court reasoned that, because IKON had allegedly "threatened to sue NewCal for interfering with its existing and potential business relationships, . . . NewCal had a stake in the controversy even though it was not a party to the relevant contracts." App. 29a (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

Three themes unite the Ninth Circuit's antitrust and RICO holdings in this case: they conflict with decisions of other courts of appeals; they are wrong on the merits; and they convert what should be (at most) common law claims brought by a business's *customers* into federal claims for treble damages brought by the

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several weeks before argument, IKON's counsel brought *Anza* to the Ninth Circuit's attention in a letter filed under Fed. R. App. P. 28(j). IKON's counsel further discussed the significance of *Anza* at the argument itself.

business's *commercial rivals*. Each of these holdings poses serious concerns for any company that can be sued in the Ninth Circuit and that seeks to renew term contracts with its customers or otherwise "leverag[es] a special relationship with its contracting partners" (App. 17a).

I. THE NINTH CIRCUIT'S RELIANCE ON "CONTRACTUAL RELATIONSHIPS" TO DEFINE ANTITRUST MARKETS IS WRONG AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

a. In *Kodak*, a majority of this Court broke new ground by holding that an antitrust market can be defined in terms of a single company's products. That approach to market definition is not nearly as radical as the Ninth Circuit's approach here, which defines antitrust markets in terms of a defendant's *contractual relationships* with particular customers. Even as far as it went, however, the majority's holding in *Kodak* has spawned sixteen years of controversy.

That controversy began on the day *Kodak* was decided, with the dissent's observation that "the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts." 504 U.S. at 489 (Scalia, J., dissenting). As the dissent added, "the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good[.]" *Id.* A decade later, Professor Hovenkamp confirmed the prescience of this warning. In implementation, "[t]he difficulties of *Kodak* are numerous, systematic, [and] incapable of correction, and have wasted untold amounts of litigation and judicial resources." Hovenkamp, *Antitrust Policy After Chicago*, 2001 Colum. Bus. L. Rev. 257, 299. And he has recently concluded that

"the time has come for the Supreme Court to recognize that *Kodak* was a failed experiment in a type of economic engineering where antitrust has no place." Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, 309-310 (2005); *see also* Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *are Misguided*, 68 Antitrust L.J. 659, 679 (2000-2001).

Quite apart from this controversy about whether *Kodak* was rightly decided, that decision has now also given rise to an entrenched circuit conflict between the Ninth Circuit, which construes *Kodak* very expansively, and several other courts of appeals, which apply it cautiously. That conflict had begun to take shape even before the decision below. As two commenters observed in 2004, "[t]he Ninth Circuit offers by far the most favorable jurisdiction for plaintiffs bringing *Kodak*-style lock-in claims." Goldfine & Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209, 226 (2004-2005).

The Ninth Circuit's decision here removes any doubt that this circuit conflict concerning the meaning of *Kodak* is real, deep, and ripe for this Court's resolution. The Ninth Circuit ruled for NewCal on its antitrust claims only because it accepted NewCal's proposal to define the relevant antitrust markets in terms of "contractual relationship[s]" (App. 15a (emphasis removed)): as "replacement copier equipment for IKON and GE customers *with flexed IKON contracts*" and "copier service for IKON and GE customers *with flexed IKON contracts*." App. 6a-7a (emphasis added; some capitalization altered). Even if the concerns about *Kodak* itself are placed aside, nothing in *Kodak* remotely supports the Ninth Circuit's novel *contract-*

based approach to market definition. That approach would have been rejected, and NewCal's antitrust claims would have been dismissed, if NewCal had sued in the Second, Third, Fifth, or Eleventh Circuits.

First, as discussed, the Third Circuit held in *Queen City* that a "court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." 124 F.3d at 438. The court added:

> Were we to adopt plaintiffs' position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws. Perhaps for this reason, *no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff.*

Id. (emphasis added). The Second Circuit reached a similar conclusion in *Hack* v. *President & Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000), in which a group of undergraduates challenged a university policy requiring them to live in dorms during their first two years of college. The Second Circuit dismissed the plaintiff's antitrust challenge after rejecting their proposed market definitions, which were based on "a contractually created class of consumers." *Id.* at 85. Like the Third Circuit, the court reasoned that "[e]conomic power derived from contractual arrangements affecting

a distinct class of consumers cannot serve as a basis for a monopolization claim." *Id.*

Similarly, in a dispute between an insurance company (Farmers) and its independent agents about access to the company's database, the Fifth Circuit held that the "relevant market" is "insurance sales" generally rather than the company- and contract-specific definition the plaintiffs had proposed ("electronic access to Farmers policy information"). *United Farmers Agents Ass'n, Inc.* v. *Farmers Ins. Exch.*, 89 F.3d 233, 236-37 (5th Cir. 1996). The Fifth Circuit explained that "[e]conomic power derived from contractual agreements such as franchises or in this case, the agents' contract with Farmers, has nothing to do with market power, ultimate consumers' welfare, or antitrust." *Id.* (internal quotation marks omitted); *accord Schlotzsky's, Ltd.* v. *Sterling Purchasing & Nat'l Distrib. Co.*, 520 F.3d 393 (5th Cir. 2008) (reaffirming this core holding of *United Farmers Agents*). And the Eleventh Circuit has held likewise.[7]

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[7] In *Mavis Distributing Co.* v. *Anheuser-Busch, Inc.*, 302 F.3d 1207 (11th Cir. 2002), the Eleventh Circuit rejected antitrust claims brought by a wholesale beer distributor against its associated brewing company, Anheuser-Busch. It reasoned that courts must "distinguish[] between contract power and market power," and "[t]he fact that Anheuser-Busch had considerable power over many aspects of [the plaintiff's] business by virtue of the provisions of the contract . . . reveals little about the issue of whether Anheuser-Busch had market power in the broader, relevant market" for equity interests in beer distributorships. *Id.* at 1222. The Eleventh Circuit distinguished *Kodak* on the ground that it "did not address at all the issue in this case" (*id.* at 1223)—the role of contractual relationships in antitrust analysis.

Each of these courts' holdings flatly contradicts the Ninth Circuit's reliance on IKON's "unique contractual relationship[s]" with particular customers (App. 15a) as its basis for defining the relevant antitrust markets. The Ninth Circuit nonetheless sought to distinguish *Queen City* on the ground that the pizza franchisees there "knowingly and voluntarily" entered into valid contracts to buy products from their franchisor; that "contractual obligations [are] not a cognizable source of market power" if they are knowingly and voluntarily undertaken; that IKON is alleged here to have deceived its customers into assuming contractual obligations; and that such alleged deceit *can* be a cognizable source of market power. App. 10a-17a (emphasis removed).

But that rationale for distinguishing *Queen City* simply ignores the threshold question of *market definition*, a mandatory first step in any Sherman Act case involving single-firm conduct, and a logical antecedent to any examination of "market power." Indeed, "[w]ithout a definition of th[e] market there is no way to measure [a defendant's] ability to lessen or destroy competition." *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965); *accord Hack*, 237 F.3d at 85 ("When we speak of monopolization or attempted monopolization, we necessarily are talking about monopoly power within a relevant market."). Fraudulent conduct in any market may give rise to liability under various causes of action. But it has no *antitrust* significance unless it harmed competition in some properly defined antitrust market.[8] And, as the

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[8] For the same reason, there is no merit to the Ninth Circuit's efforts to distinguish *Queen City* on the ground that in this case,

Second, Third, Fifth, and Eleventh Circuits recognize, no valid antitrust market can be defined in terms of individual parties' "contractual restraints." *Queen City*, 124 F.3d at 438. In particular, a defendant in those jurisdictions cannot face antitrust liability if, like IKON here, it lacks power in any market defined independently of its contractual relationships.

That is why, for example, the Third Circuit ordered the dismissal of the antitrust claims in *Queen City* even though the plaintiffs there alleged that the defendant had engaged in conduct that presumably would have violated the antitrust laws *if* it were appropriate to define the market in terms of contractual relationships. *See* 124 F.3d at 436. Under Third Circuit law, therefore, NewCal's antitrust claims would have been dismissed, because here, as in *Queen City*, the defendant lacks power in any market that is defined without reference to its own contractual arrangements. The Ninth Circuit reached the opposite conclusion below only be-

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unlike that one, "[t]he contractual relationship (not any contractual provision) gives [the defendant] special access to its consumers," which the defendant "leverages" into an expanded contractual relationship. App. 16a. Such "leveraging" can be an antitrust violation only if, as a threshold matter, the plaintiff has defined a proper market in which it claims that the leveraging harmed competition. Again, however, NewCal cannot establish that IKON harmed competition in any market except the "markets" NewCal tries to define in terms of IKON's contracts with its own customers. As discussed in the text, NewCal's antitrust theory would have been rejected in the Third Circuit and elsewhere at that threshold step. The Third Circuit is plainly correct: "contractual relationships" are ubiquitous throughout the economy, and the Ninth Circuit's logic threatens to characterize all such relationships as monopolies.

cause it concluded that it *is* permissible to define antitrust markets in terms of contractual arrangements.

On that critical issue, the Ninth Circuit is a minority of one, and its position is untenable on the merits. As the leading antitrust treatise explains, even when a class of customers is subject to "unfavorable contract lock-in . . . because of sellers' fraud or misrepresentation," any remedy "would be in contract law . . . or perhaps the law of fraud or misrepresentation or consumer protection; it would not be antitrust law." Areeda & Hovenkamp, *supra*, ¶ 519a, at 190; *see also id.* ¶ 519b, at 195 ("When fraud or other significant misrepresentation exists, . . . then a case for intervention can be made, but it would be intervention under the common law of fraud or a statute covering such contract misrepresentations."); *Colsa Corp.* v. *Martin Marietta Servs.*, 133 F.3d 853, 856 n.8 (11th Cir. 1998) (rejecting antitrust characterization of what was "really a breach of contract claim").[9]

If left uncorrected, the decision below would subject companies to treble antitrust damages in a potentially limitless range of circumstances that are properly addressed instead in ordinary common law actions between those companies and their customers. Like IKON, innumerable companies have renewable term

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[9] Indeed, this Court has rejected the proposition that a conceded monopolist in a *properly* defined market incurs antitrust liability simply because it employs fraudulent means to increase consumer prices. *See Nynex Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136 (1998). As the Court explained, an expansive view of antitrust liability in such circumstances would improperly "transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases." *Id.* at 136-137.

contracts or other "special relationship[s]" (App. 17a) with their customers. Under Ninth Circuit precedent, any such company now faces antitrust liability whenever its rivals can allege that it has "exploit[ed] its unique position—its unique contractual relationship" with those customers—even if, as here, the customers themselves have not even joined the suit. App. 15a.

There are enormous costs to superimposing such antitrust liability on top of any common law remedies for the (non-party) customers:

> Antitrust as an institution loses its credibility when market power is found too readily. Antitrust remedies are draconian, ranging from highly punitive treble damages and attorney fees in private actions to divestiture or dissolution in some suits. . . . Treble damages are particularly draconian and economically harmful in a case like *Kodak*[.]

Hovenkamp, *Antitrust Policy After Chicago*, *supra*, 2001 Colum. Bus. L. Rev. at 298. This Court has likewise held that the high cost even of "proceeding to antitrust discovery" justifies enforcement of rigorous limits on private antitrust litigation. *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007). Here, too, this Court should intervene to prevent overuse of the antitrust laws from inflicting needless costs on the economy and deterring efficient economic behavior.[10]

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[10] After resolving the central legal issue posed by the antitrust claims, the Ninth Circuit noted that "factual question[s]" might nonetheless warrant summary judgment for IKON on remand. App. 18a. In *Twombly*, the Second Circuit had similarly ruled for the plaintiffs at the motion to dismiss stage and had assured the defendants that "[w]hether the plaintiffs will be able to

b. Certiorari is separately warranted to confirm that courts may not invoke the "submarket" locution to avoid rigorous analysis of a plaintiff's proposed market definition. Citing *Brown Shoe* v. *United States*, 370 U.S. 294 (1962), the Ninth Circuit described plaintiffs' proposed market definitions—based on customers with IKON flex contracts—as "*Eastman Kodak* submarket[s]" within a larger equipment-supply and maintenance market. App. 17a. The term "submarket" does not appear in *Kodak* itself, however. And the Ninth Circuit did not explicitly contend that the concept of a "submarket" allowed it to base antitrust liability on a defendant's exercise of power in anything other than a properly defined *market*, whether or not that market is a "submarket" of some more general market.

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prevail in response to a motion for summary judgment after discovery or at trial is, of course, an entirely different matter. We have and express no view as to the merits of the plaintiffs' underlying claims[.]" *Twombly* v. *Bell Atl. Corp.*, 425 F.3d 99, 119 (F.3d 2005), *rev'd*, *Twombly*, *supra*. This Court promptly granted certiorari and reversed on the ground that the prospect of *in terrorem* strike suits and "the potentially enormous expense of discovery" warrant dismissing groundless antitrust claims early in litigation under Rule 12(b)(6). 127 S. Ct. at 1966-1967. As in *Twombly*, this Court routinely grants certiorari to review interlocutory decisions in antitrust cases where the court of appeals has ruled for the plaintiff on discrete legal issues and has remanded for further proceedings. *See, e.g.*, *Verizon Commcn's Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (reviewing Second Circuit decision that had reversed order dismissing complaint and remanded for further proceedings); *Nynex* v. *Discon*, *supra* (same); *Kodak*, *supra* (reviewing Ninth Circuit decision that had reversed grant of summary judgment for defendant and remanded for further proceedings). The same is true of interlocutory RICO decisions. *See, e.g.*, *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (reviewing Second Circuit decision that had reversed dismissal of RICO count and remanded for further proceedings).

To the extent that the Ninth Circuit did view the "submarket" locution as an invitation for sloppy market definition, however, that aspect of the decision would be erroneous as well and flatly at odds with the decisions of other courts of appeals. As the leading antitrust treatise explains, many courts have

> defined "submarket" in a way that made the term identical with the term "relevant market," even though the former term then became superfluous. . . . [For example, the D.C. Circuit] concluded that "submarket indicia" are best viewed as "proxies for cross-elasticities [of supply and demand], and thus the identification of a submarket is in principle no different than the identification of a relevant market."

Areeda & Hovenkamp, *supra*, ¶ 533c, at 257 (quoting *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987)); *see also Geneva Pharms. Tech. Corp.* v. *Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) ("The term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market."). As a result, "[s]peaking of submarkets is both superfluous and confusing in an antitrust case," Areeda & Hovenkamp, *supra*, ¶ 533c, at 254, because a group of products is either a "relevant market" in an antitrust sense or it is not. Certiorari is warranted to provide greater clarity on this issue as well.

II. THE NINTH CIRCUIT'S PERMISSIVE VIEW OF RICO'S PROXIMATE-CAUSE REQUIREMENT IS WRONG, IGNORES THIS COURT'S DECISION IN *ANZA*, AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The decision below allows a plaintiff to seek treble damages not just under the Sherman Act, but also under RICO, simply by alleging that a corporate rival defrauded its customers into extending their contracts at the purported expense of the plaintiff's commercial ambitions. App. 25a-28a. The Ninth Circuit concluded that analysis of RICO's proximate-cause requirement involves detailed "factual questions" in these circumstances that foreclose any motion to dismiss and thus inflict costly discovery burdens on defendants—factual questions concerning "whether the direct victims of the [defendant's] fraud would be likely to sue [the defendant], whether the existence of those victims would make it difficult to apportion damages, and whether the existence of those victims would create a risk of multiple recovery[.]" App. 27a. That holding directly conflicts with *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), in which this Court confirmed that the proximate-cause standard requires courts to dismiss RICO claims in these circumstances *as a matter of law*.

RICO confers a civil cause of action only on those injured "by reason of" a defendant's RICO violation. 18 U.S.C. § 1964(c). To satisfy that causation requirement, a plaintiff must "show[] that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Thus, unlike the government—which may bring RICO claims to remedy wrongdoing against the public at large—private plaintiffs must plead and prove that the RICO violations they allege caused *them* direct injury.

In *Anza*, the Court construed this proximate-cause requirement to bar RICO claims like NewCal's. It held, without qualification, that "[a] RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." 547 U.S. at 460. In *Anza* itself, the plaintiff alleged that the defendant had undersold it in the market, and had thus reduced the plaintiff's market share, by fraudulently failing to collect the requisite state sales tax from its own customers. This Court held that such fraud-based claims could be brought only by the direct victim of the alleged fraud—the state tax authority—and not by a business rival that was, at most, only secondarily harmed. *Id.*

That holding precludes NewCal's RICO claim. NewCal alleges that IKON defrauded third parties—IKON's customers—and that this purported fraud victimized not just those customers, but also, derivatively, NewCal and IKON's other competitors. But like the state tax authority in *Anza*, IKON's customers are perfectly capable of pursuing in their own right any "fraud" claims that NewCal seeks to raise here on their behalf. *Anza* holds that such derivative fraud theories categorically fail the proximate-cause requirement for civil RICO claims, and the motion to dismiss therefore should have been granted.

The policy concerns that motivated the Court's holding in *Anza* are even more pronounced in this case than in *Anza* itself. As the Court noted there, "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [the plaintiff's] lost sales were the product of [the defendant's] decreased prices." 547 U.S. at 459. That observation barely scratches the sur-

face of the implementation problems the Ninth Circuit's approach would pose in this case alone. NewCal claims (among other things) that IKON improperly deprived its rivals of profits by fraudulently retaining existing customers. Resolving that "lost profits" claim would require a court to determine precisely what percentage of IKON's customers would have extended their contracts with IKON anyway in the absence of the alleged "fraud"; precisely which customers would not have done so; and, of those, how many would have signed up instead with one of the potentially dozens of commercial alternatives to IKON, each of which could assert some entitlement to a small share of the total damages if NewCal's claims were to prevail on the merits. Similarly, the fact that none of the *direct* "victims" of IKON's alleged "fraud"—*i.e.*, IKON's actual customers—is even a party to this suit underscores the "appreciable risk of duplicative recoveries" (*id.*) within the universe of potential claimants under the Ninth Circuit's approach. Indeed, this case presents a textbook example of "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.*

Although IKON highlighted *Anza* in a Rule 28(j) letter and then at argument, *see* note 6, *supra*, the Ninth Circuit inexplicably failed even to cite that case. Because the decision below is at odds with *Anza*, this is reason enough for the Court to grant certiorari and reverse.

Finally, certiorari would be warranted even if *Anza* had never been decided, because the decision below also conflicts with the Seventh Circuit's pre-*Anza* decision in *Israel Travel Advisory Service, Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (Easterbrook, J.). There, relying on standing rather

than proximate-cause grounds, the Seventh Circuit held that "business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers." *Id.* at 1258. The court added that "firms suffering [such] derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Id.* That holding would have required the dismissal of this RICO claim if NewCal had sued in the Seventh Circuit.[11]

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[11] Quite apart from the conflicts discussed in the text, the Ninth Circuit's decision is independently at odds with the position adopted by some courts of appeals on a separate issue: whether a civil RICO plaintiff alleging mail or wire fraud as predicate acts must prove that it detrimentally relied on misrepresentations the defendant directed at it, the plaintiff. *See, e.g., Central Distribs. of Beer, Inc.* v. *Conn*, 5 F.3d 181, 184 (6th Cir. 1993) ("[T]he defendant must make a false statement or omission of fact *to the plaintiff* to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim."); *Sikes* v. *Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir. 2002) ("[W]hen a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that *he* was a target of the scheme to defraud and that he relied to his detriment on misrepresentations made in furtherance of that scheme." (internal quotation marks omitted) (emphasis added)). This Court is expected to address that reliance issue in *Bridge* v. *Phoenix Bond & Indemnity Co.*, No. 07-210 (arg. Apr. 14, 2008). But *Bridge* does not present the distinct proximate-cause and standing questions presented here.

III. The Ninth Circuit's Conclusion That A RICO Plaintiff Need Not Allege Any "Separate Organizational Structure" For An Association-In-Fact Enterprise Conflicts With Decisions Of Other Circuits

NewCal's RICO claim also deepens an independent circuit conflict relating to RICO's "enterprise" element—and would have been dismissed for failure to allege that element if suit had been brought in any of five other circuits instead of the Ninth Circuit.

RICO defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). NewCal has never alleged that IKON itself is a RICO enterprise. To the contrary, it has insisted that the relevant "enterprise" is a vaguely defined "association-in-fact" that is "distinct from" IKON and encompasses not just that company and GE, but also equipment manufacturers, financing companies, two law firms, and other "entities which assist in administering the IKON Contracts." C.A. E.R. 241-242 ¶¶ 145-46.

IKON argued below that the Ninth Circuit should affirm the dismissal of NewCal's RICO claim not just on the proximate-cause issue discussed above, but also on the independent ground that NewCal has never pleaded a coherent RICO "enterprise." IKON argued that NewCal had not described any meaningful structure for the alleged "association in fact" it posited, such as a system of authority or a decisionmaking apparatus, beyond the ordinary bilateral contractual relationships these companies had formed in the ordinary course of business. The Ninth Circuit rejected this argument on the sole ground that it had "recently held in *Odom* v. *Microsoft Corp*, 486 F.3d 541 (9th Cir. 2007), that

RICO's enterprise element does not require the allegation or proof of any separate organizational structure." App. 28a.

In *Odom*, the Ninth Circuit observed that this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981), which addressed the "association in fact" language, "has not been clearly understood in the lower courts, including our own." 486 F.3d at 549. Indeed, the Ninth Circuit observed that *Turkette* has spawned a massive circuit conflict and concluded: "Four circuits have read the language in *Turkette* to require that an associated-in-fact enterprise have some kind of ascertainable separate structure,"[12] whereas "four [other] circuits have rejected any requirement that there be an 'ascertainable structure,' separate or otherwise, for an associated-in-fact enterprise."[13] In line with its liberal pleading standards for RICO plaintiffs, the Ninth Circuit chose the latter approach. App. 27a-28a.

In April 2008, in an opinion written by Judge Posner, the Seventh Circuit explicitly repudiated *Odom* and sided with those circuits that, unlike the Ninth Cir-

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[12] *Odom*, 486 F.3d at 549-550 (citing *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (9th Cir. 2003); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983)); *see also VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000).

[13] *Id.* at 550 (citing *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir. 2001); *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983); *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983)); *see also Limestone Dev. Corp.* v. *Village of Lemont*, 520 F.3d 797, 804-805 (7th Cir. 2008) (discussing circuit conflict).

cuit, require RICO plaintiffs to plead a separate organizational structure for the posited "enterprise." *Limestone Dev. Corp.* v. *Village of Lemont*, 520 F.3d 797 (7th Cir. 2008). Citing *Odom*, the Seventh Circuit reasoned that, although "some courts believe" that "no structure is necessary," that view is wrong because it

> truncates the critical statutory language—"associated in fact *although not a legal entity*"—misleadingly. The juxtaposition of the two phrases suggests that "associated in fact" just means structured without the aid of legally defined structural forms such as the business corporation. The inference is reinforced by the fact that before "any union or group of individuals associated in fact" in the statute appears a list of legal entities. Without a requirement of structure, "enterprise" collapses to "conspiracy."

Id. at 804-805. The Seventh Circuit thus affirmed the dismissal of a RICO count for failure to allege a separate organizational structure. *Id.*

For the reasons identified by Judge Posner, the Seventh Circuit's disposition of the "enterprise" issue is correct and is necessary to honor *Turkette*'s requirement that the "enterprise" asserted in a RICO claim be "separate and apart from the pattern of activity in which it engages." 452 U.S. at 583. This Court should grant certiorari to resolve this entrenched circuit conflict about the bounds of RICO liability.

IV. The Decision Below Unlawfully Converts The Declaratory Judgment Act Into A Surrogate For Rule 23

NewCal's original complaint asserted a stand-alone claim under the Declaratory Judgment Act for a judicial declaration that thousands of IKON's contracts with its customers are invalid for various reasons, even though none of those customers is a party here. App. 29a; *see* C.A. E.R. 36-38; IKON C.A. Br. 4-5. The district court properly dismissed that claim on two alternative grounds: (i) "NewCal lacks standing to seek declaratory judgment regarding the rights and obligations of customers subject to IKON Contracts" and (ii) prudential considerations warrant denying the relief in any event, given that "the IKON customers under such contracts are not parties to this case." App. 60a-61a.

The Ninth Circuit reversed this holding too. App. 28a-31a. As to standing, the court reasoned that IKON had opened the door to sweeping judicial intervention in thousands of private contractual relationships by sending a letter complaining to NewCal about its tortious interference with some of those relationships. App. 29a. And the court ventured that "even a broad declaration that IKON's fraudulent conduct has rendered invalid all of its fraudulently procured contracts . . . would not be inadvisable under the identified prudential considerations." App. 30a. That outcome comports with the court's more general view, implicit in the antitrust and RICO sections of its opinion, that NewCal is a proper party to vindicate the interests of IKON's non-party customers.

This ruling untenably compels the district court to treat the Declaratory Judgment Act as a substitute for the Rule 23 class action mechanism even though the re-

quirements of Rule 23 have not been satisfied. NewCal has never proposed notifying the thousands of affected IKON customers that the validity of their contracts is at issue in this proceeding, as Rule 23 would require. By ignoring this concern, the Ninth Circuit brought itself into conflict with the Seventh, which has ruled that "all persons who have an interest in the determination of the questions raised in a declaratory judgment suit should be before the court." *Diamond Shamrock Corp.* v. *Lumbermens' Mut. Cas. Co.*, 416 F.2d 707, 710 (7th Cir. 1969).

Just as important, construing the Declaratory Judgment Act as a substitute for the class action mechanism in this context would subvert the core purposes of Rule 23. NewCal itself has conceded that "consumer class actions based on fraud face the hurdle that fraud claims are largely individualized and usually not susceptible [to] resolution by consumers except on a one-by-one basis." NewCal C.A. Reply Br. 29-30. And NewCal defends its own standing in this case on the ground that, "[b]ut for competitors like [NewCal], few if any IKON and GE customers[] would vindicate the raft of fraudulent practices." *Id.* at 29. But NewCal has it exactly backwards. Precisely *because* Rule 23 embodies a policy judgment that courts should not generally certify a class of allegedly defrauded customers, it would impermissibly defeat Rule 23's purposes to permit the functional equivalent of such class actions anyway under the Declaratory Judgment Act.[14] That is

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[14] *See generally Gilbert* v. *City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991) (if a declaratory relief claim "could have been resolved through another form of action" that has a "specific limitations period," the statute of limitations will constrain the declaratory relief claim as well; a court must "focus upon the substance of

particularly true where, as here, the parties purporting to "vindicate" the interests of the supposedly defrauded customers have no fiduciary obligations to those customers and may indeed have widely divergent interests from them. The Ninth Circuit's contrary conclusion is as wrong as it is strange, and it warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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an asserted claim as opposed to its form," because otherwise plaintiffs could "mak[e] a mockery" of applicable legal requirements like the statute of limitations "by the simple expedient of creative labeling—styling an action as one for declaratory relief") (quoting *Orangetown* v. *Gorsuch*, 718 F.2d 29, 42 (2d Cir. 1983)); *accord Algrant* v. *Evergreen Valley Nurseries Ltd.*, 126 F.3d 178, 184-185 (3d Cir. 1997).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16208
D.C. No. CV-04-02776-FMS

NEWCAL INDUSTRIES, INC., ET AL.,
Plaintiffs-Appellants,

v.

IKON OFFICE SOLUTION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
April 19, 2007—San Francisco, California
Filed January 23, 2008

Before: Andrew J. Kleinfeld and Sidney R. Thomas, Circuit Judges, and Timothy M. Burgess,* District Judge.

Opinion by Judge Thomas

* * * *

* The Honorable Timothy M. Burgess, District Court Judge for the District of Alaska, sitting by designation.

OPINION

THOMAS, Circuit Judge:

Five lessors of copier equipment (collectively "Newcal") appeal the dismissal of their complaint for failure to state viable Sherman Act antitrust, Lanham Act, and RICO claims against Defendant IKON.[1] We reverse.

I

Newcal and IKON compete to lease name-brand copier equipment to commercial customers.[2] They also compete to provide service contracts for the maintenance of that equipment during the term of the lease. When a lease approaches the end of its term, a new competition begins for the lease of upgrade equipment. Similarly, when a service contract approaches the end of its term, a new competition begins to buy out the service contract and to provide lease-end services.

Newcal alleges that IKON engaged in an ongoing scheme to defraud IKON customers by amending those customers' lease agreements and service contracts without disclosing that the amendments would lengthen the term of the original agreement. The purpose of extending the contracts was to shield IKON customers from competition in the aftermarkets for upgrade equipment and for lease-end services. That is, by

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[1] General Electric Corporation ("GE") bought and enforced some flexed IKON contracts and is included as a Defendant for its role in the allegedly anti-competitive scheme.

[2] Because this case is an appeal from a dismissal under Fed. R. Civ. P. 12(b)(6), we accept as true all facts alleged in the complaint, and we draw all reasonable inferences in favor of Plaintiffs-Appellants, Newcal.

extending the term of the original contract, IKON was able to raise the contract's value, which in turn raised the price to Newcal and other competitors of buying out that contract in the aftermarkets for equipment upgrades and lease-end services.

IKON, it is alleged, obtained lease extensions from its customers without disclosing that the contract amendments the customers signed would result in an extension on the term of the original lease or service agreement. In fact, IKON allegedly deliberately misled its customers to believe that the contract amendments would *not* affect the original contract's term.

Newcal, which competes with IKON both in the primary market for equipment leases and in the aftermarket for equipment upgrades, brought claims under the Sherman Act, alleging antitrust violations, under the Lanham Act, alleging false advertising, and under RICO, alleging racketeering activity predicated on mail and wire fraud. Newcal also requested a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, that IKON's fraudulently procured contracts were invalid.

On December 24, 2004, the district court dismissed the declaratory complaint and denied Newcal's request for leave to amend that complaint. The district court held that Newcal lacked standing to request a declaration of third parties' contractual rights, and it concluded that amendments to the declaratory complaint would be futile. In the same order, the district court dismissed all other claims under Rule 12(b)(6), but it granted Newcal's request for leave to amend those claims.

Newcal filed a first amended complaint, pleading its fraud allegations with greater specificity and adding

greater detail to its antitrust and Lanham Act claims. IKON again moved to dismiss under Rule 12(b)(6), and the district court granted the motion, holding that Newcal had failed to allege a legally cognizable "relevant market" under the Sherman Act, that it had failed to allege any false statement of fact under the Lanham Act, and that it had failed to meet RICO standing requirements. The district court dismissed the complaint with prejudice. This timely appeal followed.

II

A

The first question we must address is whether Newcal's antitrust claims allege any legally cognizable "relevant market." We conclude that they do, and we therefore remand those claims to the district court.

[1] In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a "relevant market." That is, the plaintiff must allege both that a "relevant market" exists and that the defendant has power within that market.[3]

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[3] Newcal brings four of its six antitrust claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, which governs restraints of trade and tying, and it brings the remaining two claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, which governs monopolization and attempted monopolization. The "relevant market" and "market power" requirements apply identically under the two different sections of the Act, meaning that the requirements apply identically to all six of Newcal's claims. *Compare Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1444 (9th Cir. 1995) (restraint of trade), *with Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1423-24 (9th Cir. 1995) (tying), *and with Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992)

There is no requirement that these elements of the antitrust claim be pled with specificity. *See Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996). An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the "relevant market" is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial. *See High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) (holding that the market definition depends on "a factual inquiry into the 'commercial realities' faced by consumers") (quotations omitted).

There are, however, some legal principles that govern the definition of an antitrust "relevant market," and a complaint may be dismissed under Rule 12(b)(6) if the complaint's "relevant market" definition is facially unsustainable. *See Queens City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997).

[2] First and foremost, the relevant market must be a *product* market.[4] The consumers do not define the boundaries of the market; the products or producers do. *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962).

(monopolization). For purposes of this opinion, therefore, there is no need to distinguish or differentiate among Newcal's various claims; its market allegations are either sufficient or insufficient for all six claims.

[4] Antitrust law requires allegation of both a product market and a geographic market. Newcal alleges a geographic market of the United States, and IKON does not challenge that allegation. The only question on appeal is whether Newcal alleged a legally viable *product* market.

[3] Second, the market must encompass the product at issue as well as all economic substitutes for the product. *Id.* As the Supreme Court has instructed, "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* As such, the relevant market must include "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989).

[4] Third, although the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket. That is, an antitrust claim may, under certain circumstances, allege restraints of trade within or monopolization of a small part of the general market of substitutable products. In order to establish the existence of a legally cognizable submarket, the plaintiff must be able to show (but need not necessarily establish in the complaint) that the alleged submarket is economically distinct from the general product market. In *Brown Shoe*, the Supreme Court listed several "practical indicia" of an economically distinct submarket: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325.

In its first amended complaint, Newcal listed four product markets: (1) "replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts," (2) "Copier Service for IKON and GE customers with Flexed IKON Contracts," (3) "Copier Service

for Canon and Ricoh brand Copier Equipment," and (4) "Copier Equipment."

[5] The district court held that the last two of those markets failed to support Newcal's claims because Newcal nowhere alleged that IKON holds market power in the nationwide market for copier equipment leases or in the nationwide market for Canon and Ricoh-brand copier equipment service. We agree with that conclusion. Newcal does not allege that IKON holds power within those markets.

The district court also concluded that the first two markets were not legally cognizable, finding that the boundaries of those markets impermissibly depended on a contractually-created group of consumers. Relying primarily on the Third Circuit's opinion in *Queens City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), and secondarily on this court's opinion in *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), the district court held that such a contractually-created group cannot constitute a "relevant market" for antitrust purposes.

Newcal responds to the district court's analysis by arguing that *Queens City Pizza* and *Forsyth* are inapposite to its claims and that the more analogous case is *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), which permitted an antitrust plaintiff to restrict its alleged market to consumers of Kodak-brand products.

We agree with Newcal. Under *Eastman Kodak*, Newcal's market definition does not fail as a matter of law, at least on a Rule 12(b)(6) motion.

In *Queens City Pizza*, the Third Circuit confronted an antitrust complaint against Domino's Pizza, brought

by a group of Domino's franchisees. 124 F.3d at 433-34. As part of their franchise contract, the franchisees had specifically agreed to make their pizzas with only Domino's-approved ingredients and supplies, and they had agreed to purchase those inputs only from the Domino's corporation or from a Domino's-approved supplier. Applying these contractual provisions, Domino's purchased approximately 90 percent of its franchisees' inputs from external suppliers and sold them to its franchisees at a markup. *Id.* at 433-34.

The franchisees sued Domino's for monopolization of the market for pizza ingredients. They restricted the relevant market definition to the market for Domino's-approved inputs, excluding from their market definition many substitutable brands of dough, tomato sauce, and paper cups. They further restricted the relevant market to Domino's franchisees, alleging that the franchisees constituted a cognizable submarket of the general market for Domino's-approved inputs. *Id.* at 435.

The Third Circuit held that the franchisees' market definition was legally deficient because the boundaries of the submarket depended on a contractual obligation. *Id.* at 438. The Third Circuit noted that market boundaries must be based on economic substitutability of the relevant product, and the only thing that prevented franchisees from substituting other brands for Domino's-approved pizza ingredients was an explicit contractual provision that the franchisees knowingly and voluntarily signed. *Id.* That contractual provision did not change the fundamental nature of the inputs, which remained economically substitutable with other brands of the same inputs; the provision merely changed the plaintiffs' legal freedom to choose substitutes. The Third Circuit held that the contractually created difference among otherwise-substitutable

products was insufficient to create an economically distinct antitrust submarket. *Id.*

The Third Circuit also grounded its holding in the fact that the primary market for franchise agreements is a competitive market. *Id.* at 440. The court reasoned that the franchisees should have been aware, at the time that they chose to enter a Domino's franchise rather than, say, a Pizza Hut franchise, that Domino's would retain exclusive rights to provide them with ingredients. *Id.* That reasoning was particularly relevant in that case, as the court noted, because the product itself was a "contractual framework" in which the franchisees' rights and obligations were clearly defined. *Id.* In other words, because the product was a written agreement that was intended to regulate rights and obligations for the foreseeable future and because there was a competitive market for substitutable written agreements that might have contained different rights and obligations, the franchisees must have made a conscious and voluntary choice to bind themselves to Domino's aftermarket restrictions. The implication of that reasoning was that competition in the primary market for franchise agreements sufficed to discipline anticompetitive conduct in the aftermarket for pizza supplies. If Domino's abused its contractual rights, it would lose business in the primary market; fewer people would choose to enter a Domino's franchise.

Based on this reasoning, the Third Circuit held that the alleged submarket of Domino's franchisees must fail. The only thing that segregated the members of the submarket from the members of the general market was an explicit contractual provision that the franchisees knowingly and voluntarily signed, and Domino's ability to abuse that contractual power would be re-

strained by competition in the primary market for franchise agreements.

The other case cited by the district court was *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997). In that case, we applied reasoning similar to the reasoning in *Queens City Pizza* to affirm summary judgment against an antitrust plaintiff. Consumers of Humana health insurance policies sued Humana, claiming that the insurance company obtained discounts from acute care hospitals without passing those discounts to consumers in the form of lower premiums. *Id.* at 1472. The antitrust theory was a monopolization claim, in which the plaintiffs alleged that Humana colluded with the relevant hospitals to give the hospitals a monopoly over the market for Humana insureds. *Id.* at 1475-76. Similar to the franchisees' claim in *Queens City Pizza*, the insureds' antitrust claim defined the "relevant market" to include only those hospital consumers who had Humana insurance policies. In other words, the plaintiffs claimed a submarket whose boundaries depended entirely on a written contract. *Id.* at 1476. And just as the Third Circuit had done in *Queens City Pizza*, we rejected that market definition, holding that explicit contractual provisions limiting Humana insureds to certain hospitals could not form the boundaries of an antitrust submarket. *Id.*

We also concluded that contractual obligations were not a cognizable source of market *power*. In other words, the relevant hospitals lacked market power in the general market for all economically substitutable hospital care; the only reason that they had a "monopoly" over Humana insureds was that the Humana insureds had signed a contract explicitly granting the hospitals that power. *Id.* The antitrust claim therefore failed.

The Supreme Court's opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), has some characteristics in common with *Queens City Pizza* and *Forsyth*, but it also has some critical differences. The general market at issue in *Eastman Kodak* was the market for long-term service contracts to maintain durable equipment, such as photocopiers and micrographic equipment. *Id.* at 455-56. The Kodak corporation manufactured such equipment, but it also offered replacement parts and long-term service agreements.

The antitrust plaintiffs in *Eastman Kodak* did not allege that Kodak held power in the general market for all such durable-equipment services; they alleged market power only in a submarket consisting of those customers that had already purchased Kodak-brand equipment and that needed replacement parts and services for that particular equipment. *Id.* at 456-59. The antitrust theory was that Kodak was engaging in illegal practices to prevent independent service companies from competing with Kodak in the aftermarket for service of Kodak-brand equipment. Owners of Kodak-brand equipment, the plaintiffs alleged, were forced to purchase replacement parts and services only from the Kodak corporation.

As in *Queens City Pizza* and *Forsyth*, the alleged market was limited to consumers of a particular brand; it included only those consumers who had knowingly and voluntarily purchased Kodak equipment. The boundaries of the relevant market, therefore, depended on the consumers' prior decision to purchase a Kodak-brand product, just as the market boundaries in *Queens City Pizza* depended on the consumers' prior decision to enter a Domino's franchise agreement and the market boundaries in *Forsyth* depended on the consumers'

prior decision to purchase a Humana insurance policy. Nevertheless, the Supreme Court held that the definition of the relevant market in *Eastman Kodak* was acceptable. *Id.* at 462-63.

The critical distinction between *Eastman Kodak* and the two circuit court opinions was that the Kodak customers did not knowingly enter a contract that gave Kodak the exclusive right to provide parts and services for the life of the equipment. In other words, the simple purchase of Kodak-brand equipment (unlike the signing of a Domino's franchise agreement or the purchase of a Humana insurance policy) did not constitute a binding contractual agreement to consume Kodak parts and services in the aftermarket. Equally critically, the Supreme Court found that market imperfections, including information and switching costs, prevented consumers from discovering, as they were shopping for equipment, that the Kodak brand would include a de facto commitment to consume only supracompetitively priced Kodak-brand service contracts. *Id.* at 473-78. The Supreme Court specifically discussed and rejected the possibility that a consumer's decision to purchase Kodak-brand equipment (in an indisputably competitive *equipment* market) was functionally equivalent to the signing of a contractual provision that gave Kodak the exclusive right to service its equipment. The Court rejected that analogy on the ground that the consumers could not, at the time of purchase, reasonably discover that Kodak monopolized the service market and charged supracompetitive prices for its service. *Id.* Kodak's market power in parts and services, therefore, did not arise from a knowing contractual (or quasi-contractual) arrangement.

[6] Taking these cases together, three relevant principles emerge. First, the law permits an antitrust

claimant to restrict the relevant market to a single brand of the product at issue (as in *Eastman Kodak*). Second, the law prohibits an antitrust claimant from resting on market power that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant (as in *Queens City Pizza* and *Forsyth*). Third, in determining whether the defendant's market power falls in the *Queens City Pizza* category of contractually-created market power or in the *Eastman Kodak* category of economic market power, the law permits an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket. The law permits an inquiry into whether consumers entered into such "contracts" knowing that they were agreeing to such a commitment.

In determining whether this case is more like *Queens City Pizza* and *Forsyth* or more like *Eastman Kodak*, there are four relevant aspects of the complaint.

The first relevant aspect of the complaint is that it alleges the existence of two separate but related markets in intrabrand copier equipment and service. The first market is an initial market for copier leases and copier service, which (as the district court correctly found) is a competitive market in which IKON has no significant market power. The second market is a derivative aftermarket for replacement equipment, which includes markets for lease "buy outs" and for "lease-end service." As in all three of the cited cases, the relevant market here is not the indisputably competitive market in which the consumers first shop for the primary product. It is an aftermarket in which the con-

sumers claim that they should be able to shop for a secondary product.[5] In this case, the primary product is the equipment lease and initial service contract, and the secondary product is the replacement equipment and the lease-end service contract. The complaint alleges that suppliers go through a different economic calculus when competing for consumers of replacement equipment and lease-end service than they do when competing for consumers of initial equipment leases and service contracts.

As noted, all three of the cases involve aftermarkets. The alleged aftermarket in this case, however, is more like the aftermarket in *Eastman Kodak* than the aftermarket in *Queens City Pizza* and *Forsyth* in one critical respect: the aftermarket here is wholly derivative from and dependent on the primary market. The markets for pizza ingredients and paper cups would exist whether or not there was a market for pizza chain franchises, and the market for acute care hospitals would exist whether or not there was a market for health insurance. But the market for durable micrographic equipment parts and services would not exist without the market for durable micrographic equipment, and the market for replacement copiers and lease-end services would not exist without the market for copier leases and copier services.

[7] The relevance of this point to the legal viability of Newcal's market definition may not be intuitively

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[5] In *Queens City Pizza*, the primary product was the franchise agreement, and the secondary product was the pizza ingredients. In *Forsyth*, the primary product was the insurance contract, and the secondary product was the hospital care. In *Eastman Kodak*, the primary product was the durable equipment, and the secondary product was the service.

obvious, but it is nevertheless significant. One of the primary considerations in *Eastman Kodak* was the uniqueness of Kodak-brand replacement parts and the resultant power that Kodak gained in the derivative services market. In other words, Kodak held a natural monopoly in the submarket for Kodak-brand replacement parts, which gave it a unique position in the wholly derivative aftermarket for service contracts. Kodak was then able to exploit that unique position to gain monopoly power in the derivative services market as well, even though its monopoly power in services was neither naturally nor contractually created. Similarly, here, IKON has a contractually-created monopoly over services provided under *original* IKON contracts. That contractually-created monopoly (which, under *Queens City Pizza*, is the power that does not count as "market power" for Sherman Act purposes) then gives IKON a unique relationship with those consumers, and the contractual *relationship* gives IKON a unique position in the wholly derivative aftermarket for replacement equipment and lease-end services. The allegation here is that IKON is, like Kodak, exploiting its unique position—its unique contractual relationship—to gain monopoly power in a derivative aftermarket in which its power is not contractually mandated.

The second relevant aspect of the complaint is that its allegations of illegal restraints of trade and illegal monopolization relate only to the aftermarket, not to the initial market. Newcal does not allege that IKON has restrained trade in the market for initial leases and service agreements, nor does it allege that IKON holds power in the primary market. Newcal alleges that the deceptive and fraudulent "flex" agreements restrain competitors' ability to compete in the derivative aftermarkets for replacement equipment, lease buy-outs,

and lease-end services. Critically, those flex agreements are not part of the initial market as they were in *Queens City Pizza*. IKON obtains the flex agreements only *after* obtaining an initial lease or contract. The flex agreements, therefore, are (allegedly) part of the separate and derivative aftermarket.

The third relevant aspect of the complaint is its description of the source of IKON's market power. According to the complaint, IKON does not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market. Rather, as noted, its market power allegedly flows from its relationship with its consumers. The contractual relationship (not any contractual provision) gives IKON special access to its consumers, and IKON leverages that relationship to gain flex agreements and lease extensions. In other words, no provision of IKON's initial contract gives it the power to provide replacement equipment, to extend the contract beyond 60 months, to foreclose competitors' buy outs, or to prevent competition in lease-end services. The alleged market power, therefore, is not a contractual power in the same sense that the alleged market power in *Queens City Pizza* and *Forsyth* was a contractual power.

The fourth relevant aspect of the complaint is that it alleges that market imperfections, as well as IKON's fraud and deceit, prevent consumers from realizing that their choice in the initial market will impact their freedom to shop in the aftermarket. Just as the plaintiffs had in *Eastman Kodak*, Newcal offers factual allegations to rebut the economic presumption that IKON consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter an IKON contract. Competition in the initial market, therefore, does not necessar-

ily suffice to discipline anticompetitive practices in the aftermarket.

[8] In the end, then, we find that Newcal's allegations are more like the allegations at issue in *Eastman Kodak* than those at issue in *Queens City Pizza*. This case is not a case in which the alleged market power flows from contractual exclusivity. IKON is not simply enforcing a contractual provision that gives it the exclusive right to provide replacement equipment and lease-end services. Rather, it is leveraging a special relationship with its contracting partners to restrain trade in a wholly derivative aftermarket. We therefore reverse the district court's holding that *Queens City Pizza* and *Forsyth* render Newcal's complaint legally invalid.

[9] That holding, however, does not quite end the matter. In considering the legal validity of Newcal's alleged market, we must also determine whether IKON customers constitute a cognizable subset of the aftermarket, such that they qualify as a submarket not only under the general principles from *Eastman Kodak* but also under the specific *Brown Shoe* standard. That is, we have thus far concluded only that there is no *per se* rule against recognizing contractually-created submarkets and that such submarkets are potentially viable when the market at issue is a wholly derivative aftermarket. Even when a submarket is an *Eastman Kodak* submarket, though, it must bear the "practical indicia" of an independent economic entity in order to qualify as a cognizable submarket under *Brown Shoe*. In this case, Newcal's complaint sufficiently alleges that IKON customers constitute a submarket according to all of those practical indicia. Newcal has therefore done enough to survive a Rule 12(b)(6) motion.

Of course, nothing we have said here guarantees that—or even speaks to whether—Newcal's complaint will survive a summary judgment motion. The actual existence of an aftermarket for replacement equipment, lease buy-outs, and lease-end services is a factual question. The actual existence of a separate economic entity (*i.e.* a submarket) that includes only IKON's customers is a factual question. The actual existence of IKON's market power within the alleged submarket is a factual question. IKON's actual leveraging of its contractual relationships (and resultant market power) to foreclose competition in the derivative aftermarket is a factual question. The initial market's actual ability, through cross-elasticity of demand, to discipline anti-competitive conduct in the aftermarket is a factual question. All of these questions remain open for resolution—either for or against Newcal—upon remand, and all of these questions are appropriate matters for resolution on summary judgment if Newcal fails to discover and present evidence to support its allegations. We conclude only that Newcal's allegations state a claim upon which relief could be granted, and we remand on that basis only.

B

[10] In addition to arguing that Newcal failed to allege a relevant market, IKON asks us to affirm the district court's dismissal order on the alternative ground that Newcal failed to state claims based on exclusive dealing, tying, restraint of trade, and attempted monopolization. IKON's arguments, however, all hinge on factual disagreements rather than legal deficiencies, such that the arguments do not support affirmance of the Rule 12(b)(6) dismissal.

First, IKON argues that Newcal failed to state a claim for exclusive dealing on the ground that the IKON contracts do not, in fact, contain exclusive dealing provisions. This assertion hinges on a factual question, namely the precise terms of the IKON contracts. Newcal's complaint alleges that "IKON and GE have entered into exclusive dealing arrangements with their IKON Contracts, IKON Amendments and Flexed IKON Contracts[.]" That allegation, which we must accept as true, is enough to survive dismissal under Rule 12(b)(6).

Second, IKON argues that Newcal failed to state a claim for tying because it failed to allege that IKON forces its consumers to accept the tied product. Newcal specifically alleged, however, that IKON has "been able to force purchasers of the tying product who are locked in at the end of the original term of the cost-per-copy lease by the Flexed IKON Contract to buy the tied product[.]" Once again, that allegation suffices to survive a motion to dismiss. IKON further argues that no set of facts will be available to demonstrate that IKON has the *ability* to force ties on its consumers because it lacks market power in the tying product, namely the replacement copier equipment. In support of that point, IKON cites *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 126 S.Ct. 1281 (2006), for the proposition that a plaintiff must prove "market power in the tying product" in order to establish a tying claim. *Id.* at 1293. IKON is undoubtedly right that Newcal must prove market power in the tying product, but the existence or non-existence of that market power is a factual question. In fact, in *Illinois Tool Works*, the Supreme Court eliminated a legal rule that patent holders would be presumed to hold market power in patented products. The Court held that a

finding of monopoly "must be supported by proof of power in the relevant market rather than by a mere presumption thereof." *Id.* at 1291. The Court's reasoning, thus, supports the conclusion that market power is in this case a factual question. Resolution of the market power question on a Rule 12(b)(6) motion is therefore inappropriate in this case.

Third, IKON argues that Newcal's generic restraint of trade claim should be dismissed. IKON's argument on this point simply reiterates its assertion that Newcal failed to allege any viable market. We have already addressed and rejected that argument; IKON offers no independent reason to dismiss Newcal's generic restraint of trade claim.

Fourth, IKON argues that Newcal failed to state its claims of conspiracy to monopolize and attempted monopolization. Once again, this argument simply reiterates the market arguments without providing any independent reason to dismiss the claims.

[11] In sum, Newcal's antitrust claims do not fail to state a claim upon which relief may be granted.

III

The second question on appeal is whether Newcal sufficiently alleged false or misleading statements of fact to support its Lanham Act claim. The district court found that all five of the statements identified in Newcal's complaint were insufficient to support the claim. Because the district court's conclusions with respect to four of those five statements rested on factual findings rather than legal conclusions, we reverse the Rule 12(b)(6) dismissal and remand Newcal's Lanham Act claim.

Under the Lanham Act, a "prima facie case requires a showing that (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2000).

[12] Newcal alleged all elements of a Lanham Act violation, specifically listing the following five false or misleading statements of fact: "(a) that IKON [ ] would deliver 'flexibility' in their 'cost-per-copy' contracts and that they would lower copying costs for consumers; (b) that IKON [ ] would deliver 95% up-time service in their IKON Contracts; (c) that original IKON Contracts were intended by IKON to be for a fixed term of sixty (60) months and would expire at the end of that term; (d) that IKON Amendments for sixty (60) months applied only to the changes on the Amendment, not to the entire fleet of IKON [ ] Copier Equipment of the consumer; and (e) that IKON's 'flexing' practices had been declared legal by [the District] Court in its opinion of December 23, 2004."

The district court concluded that statement (a) constituted "puffing," that statements (b) and (c) were not " 'false or misleading representations of fact' at the time they were made," and that statements (d) and (e)

could not "reasonably be said to have been made in 'a commercial advertisement or promotion.' "[6]

First, we agree with and affirm the district court's conclusion that statement (a) constitutes "puffing." In *Cook, Perkiss, & Liehe v. Northern California Collection Service, Inc.*, 911 F.2d 242, 245 (9th Cir. 1990), we concluded that the determination of whether an alleged misrepresentation "is a statement of fact" or is instead "mere puffery" is a legal question that may be resolved on a Rule 12(b)(6) motion. A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance. Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim. *Id.* at 246. "The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." *Id.* Thus, a statement that is quantifiable, that makes a claim as to the "specific or absolute characteristics of a product," may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery. *Id.* In this case, statement (a) is not a quantifiable claim and does not describe (or misdescribe) any specific or absolute characteristic of IKON's service. Rather, it is a general assertion that IKON provides its customers with low

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[6] IKON argues that Newcal waived all of its arguments except those directed at the district court's first conclusion by failing to argue those points before the district court in its opposition to the motion to dismiss. According to IKON, the only question that Newcal preserved for appeal is the question of whether statement (a) constitutes "puffing." We disagree. There was sufficient argument in the opposition brief to preserve all of Newcal's arguments for review.

costs and with flexibility. That kind of general assertion is classic puffery. The district court, therefore, was correct to conclude that statement (a) could not support Newcal's Lanham Act claim.

The second question we must address is whether statements (b) and (c) were " 'false or misleading statements of fact' at the time they were made." With respect to statement (b), the question of whether IKON does or does not actually "deliver 95% up-time service in their IKON Contracts"—as well as the question of whether it actually had a 95% rate of up-time service at the time that IKON made that statement—are factual questions. Our review is limited to facts alleged in the complaint. The complaint alleges that this statement was false when made, and so it survives 12(b)(6) scrutiny.

With respect to statement (c), IKON correctly points out that other parts of Newcal's complaint allege that initial IKON contracts were limited to 60 months, which would support the inference that statement (c) ("that original IKON Contracts were intended by IKON to be for a fixed term of sixty (60) months and would expire at the end of that term") was true when made. But that inference could be proved false, or the statement could be proved true but misleading. *See Cook, Perkiss, & Liehe*, 911 F.2d at 245. Newcal alleges that the assurance of a 60 month limitation on the contract was misleading since IKON allegedly intended to—and allegedly did—fraudulently extend those contracts. The validity of that statement as an actionable statement therefore may depend on whether IKON knew at the time that it made the statement that it would fraudulently "flex" the contracts beyond their 60 month terms. And the question of IKON's knowledge and intent is a factual question. With respect to state-

ment (c), therefore, there remains a factual question of whether the statement was intentionally *misleading* at the time it was made.

We therefore reverse the district court's holding with respect to statements (b) and (c).

The final question is whether statements (d) and (e) could "reasonably be said to have been made in 'a commercial advertisement or promotion.'" To constitute commercial advertising or promotion, a statement of fact must be:

> (1) commercial speech; (2) by the defendant who is in commercial competition with the plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Coastal Abstract Service, Inc. v. First American Title Insurance Co., 173 F.3d 725, 735 (9th Cir. 1999) (quotation marks omitted). Whether the relevant statements were "disseminated sufficiently to the relevant purchasing public," *id.*, may turn out to be true or false, but the allegation suffices for purposes of stating a claim. Newcal alleged that IKON made all five of the alleged false statements "in commercial advertising and promotion of [its] goods and services to all IKON and GE customers[,] . . . by the broad dissemination of pieces of promotional literature to thousands of accounts by IKON's and GE's over 2,000 sales representatives and employees." Newcal must be given an opportunity to

prove that the alleged statements were made in commercial advertising.

IKON's citation to *Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 465 F. Supp. 2d 956 (N.D. Cal. Dec. 1, 2006), does not change this analysis. That case found on a motion for *summary judgment* that the factually-established "handful of statements to customers" did not constitute sufficient dissemination in the industry at issue in that case. On remand, the district court here will be free to reach the same conclusion, but only after Newcal has had an opportunity to present evidence in support of its allegations and has failed to meet its burden of proof. IKON has offered no citation that would support dismissal as a matter of law.

[13] We therefore reverse and remand Newcal's Lanham Act claim. The complaint sufficiently alleges all elements of a Lanham Act violation, including several false statements of fact that were allegedly disseminated to the relevant market's consumers. The district court correctly held that statement (a) constitutes puffery, but statements (b)-(e) should have survived the motion to dismiss and must therefore be remanded for evidentiary development.

IV

The third question on appeal is whether Newcal has standing to pursue its RICO claim. The district court concluded that it does not. We reverse and remand.

The statutory provision that creates a RICO civil action, 18 U.S.C. § 1964(c), allows "[a]ny person injured in his business or property by reason of a violation of" the RICO statute to bring a civil suit for treble damages. To demonstrate RICO standing, a plaintiff must

allege that it suffered an injury to its "business or property," 18 U.S.C. § 1964(c), as a proximate result of the alleged racketeering activity, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). In other words, RICO standing requires compensable injury and proximate cause.

In this case, Newcal alleges two injuries. First, it claims that IKON's fraud foreclosed "specific named customer accounts" from competition, thereby decreasing Newcal's market share. Second, Newcal claims to have paid a fraudulently inflated price to buy out certain accounts that were under flexed IKON contracts.

[14] Relying on *Oscar v. University Students Co-Operative Association*, 965 F.2d 783, 785-86 (9th Cir. 1992) (en banc), and *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992), the district court first held that Newcal's alleged injuries are speculative injuries, which were not compensable under RICO. Since the district court issued its order, we have overturned the rules on which the court relied. In *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc), we held that an injury is compensable under RICO if the injury constitutes "harm to a specific business or property interest" and if the alleged business or property interest is cognizable under state law. *Id.* The district court has not had the opportunity to consider *Diaz*. We therefore remand the RICO claim to the district court for reconsideration of the compensable injury requirement under *Diaz*.

[15] In this circuit, three factors are relevant in determining whether a plaintiff has shown proximate cause:

> (1) whether there are more direct victims of the alleged wrongful conduct who can be counted

> on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Ass'n of Wash. Pub. Hosp. Dists. v. Phillip Morris Inc., 241 F.3d 696, 701 (9th Cir. 2001). The existence of more-direct victims defeats proximate cause if we can count on those injured parties to "vindicate the law as private attorneys general" or if the existence of other injured parties creates difficulties of apportionment or risks of multiple recovery. *Id.* *See also Oregon-Laborers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963-67 (9th Cir. 1999). The three questions here, therefore, must be whether the direct victims of IKON's fraud would be likely to sue IKON, whether the existence of those victims would make it difficult to apportion damages, and whether the existence of those victims would create a risk of multiple recovery against IKON. Those questions are all factual questions, which we cannot resolve on a Rule 12(b)(6) motion in this case. We therefore remand to the district court for further consideration of the proximate cause requirement under the appropriate standard. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168-69 (9th Cir. 2001) (reversing a Rule 12(b)(6) dismissal because certain proximate cause elements required factual development).

[16] IKON also argues, as an alternative basis for affirming the district court's dismissal order, that Newcal failed to allege a RICO enterprise. The definition of "enterprise" in the text of the RICO statute is as follows: " 'enterprise' includes any individual, partnership,

corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). We recently held in *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), that RICO's enterprise element does not require the allegation or proof of any separate organizational structure. Newcal's complaint alleges a sufficient enterprise-in-fact under *Odom*.

Finally, IKON asks us to affirm dismissal on the ground that Newcal failed to allege its fraud allegations with sufficient particularity, as required under Fed. R. Civ. P. 9(b). Specifically, IKON asserts that Newcal failed to identify the false statements of fact that give rise to the fraud allegation. We disagree.

[17] Newcal alleged several forms of misrepresentation and deception in which IKON purportedly engaged. Also, the complaint specifically alleges that GE, which bought and enforced some flexed IKON contracts, knew about the fraud and actively profited from the fraud. Because GE allegedly knew about the fraud, participated in gathering profits from the fraud, and did, in fact, profit from the fraud, its specific intent can be inferred. These allegations are sufficient to satisfy Rule 9(b).

V

The last question on appeal is whether the district court abused its discretion when it dismissed Newcal's declaratory complaint without granting leave to amend. We hold that it did.

Newcal sought a declaration that all flexed IKON contracts were void and unenforceable. The district court denied that request on two grounds: (1) that Newcal lacked constitutional standing to bring the ac-

tion because it lacked a cognizable interest in the enforceability of third-party contracts and (2) that prudential considerations counseled against granting the request because a declaratory judgment would not prevent future litigation.

The district court erred in finding an absence of constitutional standing. Newcal alleged in its declaratory complaint that IKON had threatened to sue Newcal for "interfering with its existing and potential business relationships." Newcal sought a declaration that the business relationships with which it interfered were not legally protectable because they were obtained through fraud.

[18] On that basis, Newcal had a stake in the controversy even though it was not a party to the relevant contracts. *Cf. Mardian Equipment Co. v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 2456214, at *5 (D. Ariz. Aug. 22, 2006) ("Here, Plaintiff and St. Paul have no adverse legal interests."); *Meccatech v. Kiser*, 2006 WL 2690063, at *5 & n.6 (D. Neb. Sept. 18, 2006) (holding that the declaratory plaintiff faced "no threat of pecuniary loss"). We have held under similar circumstances that the threat of suit is enough to create standing, such that the threatened party may seek a declaration that the threatening party's putative rights are invalid. *See, e.g., Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938 (9th Cir. 1981). The district court therefore erred in holding that Newcal lacked constitutional standing to bring its declaratory complaint.

[19] For similar reasons, the district court erred in holding that the grant of declaratory relief would serve no useful purpose. The district court cited *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir.

1985), for the proposition that a court should deny declaratory relief "when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." In *Washington*, the court below had issued a declaratory judgment that the State of Washington owed a general obligation and duty under treaty "to refrain from degrading or authorizing the degradation of the fish habitat to an extent that would deprive the treaty Indians of their moderate living needs." *Id.* at 1355. The Ninth Circuit vacated that declaratory judgment on the ground that it was too broad; it was not based "upon concrete facts which underlie a dispute in a particular case." *Id.* at 1357.

In this case, even a broad declaration that IKON's fraudulent conduct has rendered invalid all of its fraudulently procured contracts would be a declaration that is grounded in the particular facts of the controversy before the court, namely Newcal's allegedly tortious interference with all such current and prospective contracts. Furthermore, that declaration would meet the test that the district court announced. It would "clarify or settle the legal relations in issue" (*i.e.* IKON's legal right to recover from Newcal for tortious interference), and it would "afford relief from the uncertainty faced by the parties" (*i.e.* both Newcal's and IKON's uncertainty as to the legal validity of IKON's tortious interference theory).

[20] We therefore reverse the district court's dismissal of Newcal's declaratory complaint and remand. The threat of litigation is a cognizable injury for standing purposes, and the grant of declaratory relief would not be inadvisable under the identified prudential considerations.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16208
D.C. No. CV-04-02776-FMS
Northern District of California,
San Francisco

NEWCAL INDUSTRIES, INC.,
a California Corporation; et al.,
Plaintiffs-Appellants,

v.

IKON OFFICE SOLUTION; et al.,
Defendants-Appellees.

[STAMP: FILED MAR 07 2008]

ORDER

Before: KLEINFELD and THOMAS, Circuit Judges, and BURGESS,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Kleifeld and Thomas voted to reject the suggestions for rehearing en banc and Judge Burgess so recommended.

* The Honorable Timothy M. Burgess, District Court Judge for the District of Alaska, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-2776 FMS

NEWCAL INDUSTRIES, INC., et al.,
Plaintiffs,

v.

IKON OFFICE SOLUTIONS, INC., et al.,
Defendants.

May 16, 2005

ORDER ON IKON OFFICE SOLUTIONS, INC.'S AND GENERAL ELECTRIC CAPITAL CORPORATION'S MOTIONS TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Smith, J.

INTRODUCTION

Before the Court are two motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) submitted by Defendants IKON Office Solutions, Inc. ("IKON") and General Electric Capital Corp. ("GE Capital" or "GE"). IKON and GE Capital argue that all claims asserted by Plaintiff Newcal et al. ("Newcal") in its First Amended Complaint should be dismissed for failure to state a claim. Having considered the pleadings and papers filed by both sides, the Court GRANTS defendants' motions to dismiss with prejudice.

BACKGROUND

The factual background of this case is contained in the Court's December 23, 2004 Order regarding defendants' previous motion to dismiss, incorporated by reference (the "December Order"). Newcal and its co-plaintiffs compete with Defendant IKON in the market to supply and service multiple brands of copiers, printers and facsimile equipment ("Copier Equipment") to businesses and other organizations. Defendant GE Capital is a successor-in-interest to IOS Capital, which was a fully owned subsidiary of IKON that provided lease financing and administration services for IKON. On March 30, 2004, IOS Capital was legally merged with IKON, and GE Capital acquired certain assets and liabilities of IOS including its operation that administers the leases at issue in this action.

IKON often sells Copier Equipment through bundled cost-per-copy or other lease/rental contracts ("IKON Contracts"). The IKON Contracts provide businesses with equipment financing, bundled with supplies, parts and services for a fixed period, typically five (5) years. It has been the practice of Newcal and other competitors to make bids to IKON customers in which they offer to replace the IKON Copier Equipment and pay for the "buy-out" or "lease-end" charges due under the IKON Contract. However, during the five year period of the IKON contract, IKON often secures one or more amendments to the IKON Contracts that extend the period of time that customers are under contract with IKON. Such amendments are usually secured at the same time that IKON replaces or adds copier equipment or accessories or otherwise changes the terms the original contract. The longer contract term reduces the ability of Newcal and other competi-

tors to make deals with IKON customers to replace IKON Copier Equipment.

Newcal claims that IKON acquires both the original IKON Contracts and the amendments that lengthen IKON Contracts through a pattern of "fraudulent, unfair, and otherwise unlawful practices." In terms of the original contract, for example, IKON allegedly falsely represents or conceals its intent to extend the term of the IKON Contract beyond the original term of 60 months. In terms of the amendments, IKON allegedly uses a variety of tactics to conceal the fact that the contract term is being extended when customers sign a contract amendment. For example, Newcal claims that IKON uses "pretexts" such as representing that the customer is eligible for a "free" machine or accessories in order to induce the customer to sign the amendment without calling the customer's attention to, or even misrepresenting, the fact that the amendment lengthens the contract term. Newcal also alleges that IKON designed the amendment forms and trained its employees in ways intended to misrepresent the contract extensions Newcal claims that these business practices allow IKON to obtain new customers at lower costs than other Copier Equipment dealers and make supra-competitive profits from the amended contracts.

The present motions seek to dismiss Newcal's First Amended Complaint ("FAC"). Newcal's original complaint in this action was filed on July 12, 2004. On December 23, 2004, the Court issued an order granting defendants' motions to dismiss and allowing Newcal an opportunity to amend the complaint. On February 14, 2005, plaintiffs filed their FAC reasserting causes of action under the Sherman Act, the Lanham Act and RICO. The FAC sets forth new allegations against Defendant GE Capital. Defendants IKON and GE Capital

moved to dismiss the First Amended Complaint on March 10, 2005.

DISCUSSION

The legal standards applicable to a motion to dismiss were set forth in this Court's December Order, and need not be repeated.

A. Antitrust Claims

In its FAC, Newcal realleges six violations of Sections 1 and 2 of the Sherman Antitrust Act. In the Court's December Order, the Court dismissed these claims because Newcal failed to allege a valid relevant market. While Newcal has made some changes to the proposed relevant markets, the Court finds that Newcal has failed to correct the material deficiencies identified in its previous order.

In the FAC, Newcal proposes two "principal relevant markets": the markets for (1) replacement Copier Equipment for IKON and GE customers with Flexed IKON Contracts and (2) Copier Service for IKON and GE customers with Flexed IKON Contracts. Newcal also proposes two "additional, broader, relevant markets": the markets for (3) the sale of Copier Service for Canon and Ricoh brand Copier Equipment and (4) the sale of Copier Equipment.

The first two proposed relevant markets are again rejected because they are defined solely in terms of IKON customers that have contracts with IKON. As stated in the December Order, the existence of power under a contract does not create market power in the antitrust sense, absent market power over a product or service. See *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 438 (3d Cir. 1997); *Forsyth v. Humana, Inc.*,

114 F.3d 1467 (9th Cir. 1997); *Hack v. President & Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000). Newcal's references to *Eastman Kodak Co. v. Tech. Servs.*, 504 U.S. 451 (U.S. 1992), do not save these proposed relevant markets. In that case, the essential core of the relevant product market was not defined in terms of consumers who had contracts with Kodak, but rather in terms of the service and replacement parts required by Kodak equipment owners and controlled by Kodak. As this Court stated in its December order, in the instant case, "[i]t is the contract itself that requires them to be customers of IKON rather than the market power of IKON over any product or service. This is the critical distinction between *Eastman Kodak* and the present case." Newcal's third and fourth relevant markets also fail as Newcal is again unable to allege that IKON has market power in them. In contrast to the situation in *Eastman Kodak* where Kodak produced the copier equipment and wielded market power over the availability of service and replacement parts, IKON is merely a distributor of copier equipment and has no such market power.

In sum, Newcal's FAC has failed to cure the deficiencies in the original complaint. Any hypothetical claims that might arise from the alleged injuries of IKON customers in this case would be problems of contract law and negotiation, not antitrust problems. This Court is being called to apply antitrust law, and in order to do that, a valid relevant market and market power must be alleged. Because Newcal cannot do so, the Court must dismiss.

B. Lanham Act Claim

In its seventh claim for relief, Newcal alleges that IKON violated the Lanham Act, 15 U.S.C.

§ 1125(a)(1)(B), which prohibits false and misleading statements in commercial advertising or promotion. In the Court's December Order, Newcal's Lanham Act claims were dismissed because the alleged statements were either true when stated or constituted "puffery" not actionable under the Lanham Act.

In its FAC, Newcal claims that the following false and misleading statements were made: (a) that IKON and GE would deliver flexibility in their cost-per-copy contracts and that they would lower costs for consumers; (b) that IKON and GE would deliver 95% up-time service; (c) that original IKON contracts were intended by IKON to be for a fixed term of sixty (60) months and would expire at the end of that term; (d) that IKON amendments for sixty (60) months applied only to the changes on the Amendment rather than to the entire fleet of IKON or GE equipment; and (e) that IKON's flexing practices had been declared legal by this Court in its December Order.

For similar reasons given in the December Order, Newcal again fails to state a claim under the Lanham Act. The first statement alleged by Newcal to be violative of the Lanham act constitutes "puffing" and is not actionable under the Lanham Act. *See, e.g., Cook, Perkiss, and Liehe, Inc. v. N. Cal. Collection Service, Inc.*, 911 F.2d 242, 245-247 (9th Cir. 2000). The second and third statements cannot be considered to have been "false or misleading representations of fact" at the time they were made, and thus are not actionable under the Lanham Act. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 730 (9th Cir. 1999). The fourth and fifth allegedly false statement cannot reasonably be said to have been made in "a commercial advertisement or promotion" as is required under the

Lanham Act. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 n. 4 (9th Cir. 2002).

C. RICO Claim

In its eighth claim for relief, Newcal alleges that IKON violated RICO, 18 U.S.C. § 1961 et seq., by engaging in a pattern of racketeering activity that consisted of repeated acts of mail fraud relating to the amendment of IKON contracts. In the December Order, the Court dismissed Newcal's RICO claim for failing to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for fraud.

Although Newcal's FAC now pleads its RICO claim with greater specificity, it must be dismissed on other grounds. To establish standing to pursue a RICO claim, a plaintiff must allege a cognizable injury proximately caused by the alleged RICO violation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Section 1964(c) provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." 18 U.S.C. § 1964(c). Although RICO is to be "liberally construed," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985), case law in the Ninth circuit limits the injuries compensable under RICO. *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309-1310 (9th Cir., 1992), *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc), petition for cert. filed, 61 U.S.L.W. 3171 (U.S. Sept. 1, 1992) (No. 92-385). A showing of "injury" requires proof of concrete financial loss. *Imagineering* at 1309; *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) (Actual injury, that is financial loss or injury, is required to recover under RICO.).

A RICO plaintiff must also show that his injury was proximately caused by the defendant's wrong. *Imagineering* at 1311 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258). This requires that there must be a direct relationship between the injury asserted and the injurious conduct alleged. *Homes* at 268-69 ("[A] plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover.") *See also Imagineering* at 1312 (holding that minority-and women-owned subcontractors could not sue general contractors under RICO for an illegal scheme to evade federally required quotas); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963-67 (9th Cir. 1999) (holding that health care trust funds could not sue tobacco companies under RICO because their injury derived from the smokers' injury); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 703 (9th Cir. 2001) (holding that providers of health care services could not sue tobacco companies under RICO because their injury derived from the smokers' injury).

In the instant case, Newcal is unable to show a concrete injury that was proximately caused by the defendants' wrongs. Newcal alleges that it was "foreclosed from specific [customer] accounts," but this is a speculative injury that is insufficient to confer standing under RICO. *See Imagineering* at 1311-12, *Lancaster Cnty. Hosp. v. Antelope Valley Hosp.*, 940 F.2d 397, 406 (9th Cir. 1991). Newcal also alleges direct injury on the basis that it made buy-out payments to IKON and GE to enable customers to terminate their flexed contracts. Newcal, however, voluntarily assumed the obligation to pay the contract termination fees in order to obtain the

customers' business. Courts regularly dismiss fraud-based RICO claims in which the alleged misrepresentations were directed at third parties rather than at the plaintiff. *See, e.g., Byrne v. Nezhat*, 261 F.3d 1075, 1110 (11th Cir. 2001), *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F .3d 1250, 1258 (7th Cir. 1995). As defendants argue, Newcal is not the proper party to assert this RICO claim.

CONCLUSION

For the reasons stated above, Newcal has failed to state a claim under the Sherman Act, the Lanham Act, or RICO against either IKON or GE Capital. IKON and GE Capital's motions to dismiss are therefore GRANTED. Because Newcal has offered no basis for the Court to believe that further amendments would not be futile, Newcal's FAC is DISMISSED with prejudice. The clerk shall close the file.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 04-2776 FMS

NEWCAL INDUSTRIES, INC., et al.,
Plaintiffs,

v.

IKON OFFICE SOLUTIONS, INC., et al.,
Defendants.

Dec. 23, 2004

ORDER GRANTING IKON OFFICE SOLUTIONS, INC.'S AND GENERAL ELECTRIC CAPITAL CORPORATION'S MOTIONS TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

SMITH, J.

INTRODUCTION

Before the Court are two motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) submitted by Defendants IKON Office Solutions, Inc. ("IKON") and General Electric Capital Corp. ("GE Capital"). IKON argues that all claims asserted by Plaintiff Newcal et al. ("Newcal") should be dismissed for failure to state a claim. GE Capital joins IKON's motion to dismiss but also argues that Newcal's only claim against GE Capital, a claim for relief under the Declaratory Judgment Act, fails independently. Hav-

ing considered the pleadings and papers filed by both sides, the Court GRANTS defendants' motions to dismiss. To ensure the plaintiff a full opportunity to pursue its claims, the Court also GRANTS Newcal one opportunity to amend all of its dismissed claims with the exception of its claim for declaratory relief.

FACTUAL BACKGROUND

The factual background of this case may be summarized from the complaint, accepting its allegations as true and quoting from it as appropriate. Newcal and its co-plaintiffs compete with IKON in the market to supply and service multiple brands of copiers, printers and facsimile equipment ("Copier Equipment") to businesses and other organizations. Defendant GE Capital is a successor-in-interest to IOS Capital, which was a fully owned subsidiary of IKON that provided lease financing and administration services for IKON. On March 30, 2004, IOS Capital was legally merged with IKON, and GE Capital acquired certain assets and liabilities of IOS including its operation that administers the leases at issue in this action.

IKON often sells Copier Equipment through bundled cost-per-copy or other lease/rental contracts ("IKON Contracts"). The IKON Contracts provide businesses with equipment financing, bundled with supplies, parts and services for a fixed period, typically five (5) years. It has been the practice of Newcal and other competitors to make bids to IKON customers in which they offer to replace the IKON Copier Equipment and pay for the "buy-out" or "lease-end" charges due under the IKON Contract. Newcal alleges that the economics of the contracts makes it impracticable to do so until approximately 70% of the lease has run. During the five year period of the IKON contract, however,

IKON often secures one or more amendments to the IKON Contracts that extend the period of time that customers are under contract with IKON. Such amendments are usually secured at the same time that IKON replaces or adds copier equipment or accessories or otherwise changes the terms the original contract. By lengthening the contract term, IKON reduces the ability of Newcal and other competitors to make deals with IKON customers to replace IKON Copier Equipment.

Newcal alleges that IKON acquires both the original IKON Contracts and the amendments that lengthen IKON Contracts through a pattern of "fraudulent, unfair, and otherwise unlawful practices." In terms of the original contract, for example, IKON allegedly falsely represents or conceals its intent to extend the term of the IKON Contract beyond the original term of 60 months. In terms of the amendments, IKON allegedly uses a variety of tactics to conceal the fact that the contract term is being extended when customers sign a contract amendment. For example, IKON uses "pretexts" such as claiming the customer is eligible for a "free" machine or accessories to induce the customer to sign the amendment without calling the customer's attention to, or even misrepresenting, the fact that the amendment lengthens the contract term. Newcal also alleges that IKON designed the amendment forms and trains its employees in ways intended to reduce the customers' ability to know that their contract terms were being extended. According to Newcal, IKON's pattern of business practices allows it to obtain new customers at lower costs than other Copier Equipment dealers and make supracompetitive profits from the amended contracts.

Newcal's complaint asserts twelve claims for relief, including federal law claims under the Sherman Act, Lanham Act, RICO, and Declaratory Judgment Act; and state law claims for tortious interference with business relations and violations of the California Business and Professions Code. IKON seeks dismissal of each claim asserted by Newcal pursuant to Federal Rule of Civil Procedure 12(b)(6). GE Capital joins Newcal in seeking dismissal of each claim, but also moves the court specifically to dismiss Newcal's claim for declaratory relief, which is the only claim for relief asserted against GE Capital. The Court heard oral argument on the motions on November 18, 2004.

LEGAL STANDARD

Dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir. 2003), citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Roe v. City of San Diego*, 356 F.3d 1108, 1112 (9th Cir. 2004).

The Ninth Circuit has consistently held that leave to amend should be granted unless the district court "determines that the pleading could not possibly be cured by the allegation of other facts." *United States v. Smithkline Beecham Clinical Labs.*, 245 F.3d 1048, 1052 (9th Cir. 2001), citing *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (internal quotation marks and citations omitted). However, leave to amend need not be given if the plaintiff has repeatedly failed to cure de-

ficiencies by previous amendments or if further amendments are likely to be futile. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

DISCUSSION

A. Antitrust Claims

Six of Newcal's twelve claims are alleged violations of Sections 1 and 2 of the Sherman Antitrust Act.[1] With respect to all of Newcal's antitrust claims, IKON argues that Newcal has failed to allege a legally sufficient relevant market. To establish a claim under Section 1, a plaintiff must show that: 1) there was a contract, combination, or conspiracy; 2) the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) the restraint affected interstate commerce. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 632-33 (9th Cir. 1987). Claims for violation of Section 2 must allege two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power. *Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996),

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[1] The Act provides in relevant part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal....
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....15 U.S.C. §§ 1-2

citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

To prevail on either type of claim, Newcal must show, among other things, that IKON has market power in the relevant product market. *See, e.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1444 (9th Cir. 1995) (market power required for conspiracy to restrain trade); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (market power required for monopolization); *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1423-24 (9th Cir. 1995) (market power in tying product required for tying claim).

The outer boundaries of a relevant product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); *see also, Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479 (3rd Cir. 1992) ("If a defendant offers a unique and nonreplicable product, ... other products may not be adequate substitutes for it, and hence are not part of the same market."). The Ninth Circuit has defined the "relevant market" as the group of sellers or producers who have the "actual or potential ability to deprive each other of significant levels of business." *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). As explained by the Ninth Circuit, "If consumers view the products as substitutes, the products are part of the same market." *Rebel Oil*, 51 F.3d at 1435.

IKON bases its motion to dismiss primarily on the argument that Newcal has failed to allege a relevant

market. In its complaint, Newcal proposes four relevant markets: (1) the interbrand market for Copier Equipment; (2) the market for the sale and financing of additional Copier Equipment with customers for whom IKON has similar equipment placed; (3) the market for the sale and financing of replacement Copier Equipment previously placed, serviced, financed, and administered by IKON pursuant to a multi-year IKON Contract; (4) the markets for parts, service and supplies for each brand of Copier Equipment placed, serviced, financed and administered by IKON [pursuant] to a multi-year IKON Contract.

Newcal first argues that market definition is a question of fact that is not appropriate for resolution on a motion to dismiss. While the relevant market may often be a question of fact, that is not always the case. Circuit courts that have addressed the issue, including the Ninth Circuit, have held that the plaintiff's failure to identify a relevant market is a proper ground for dismissal in a Rule 12(b)(6) motion. *Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1062-63 (9th Cir. 2001) (affirming dismissal of action where plaintiff attempted to restrict the relevant market to a single athletic program in Los Angeles based on her preference to stay in Los Angeles); *Hack v. Yale College*, 237 F.3d 81 (2nd Cir. 2000) (affirming dismissal where plaintiff's definition of the relevant market focused on a contractually created class of consumers); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3rd Cir. 1997) (affirming dismissal where plaintiff attempted to limit relevant market to products approved by franchisor); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992) (affirming dismissal where plaintiff alleged a relevant product

market over which the defendant held a natural monopoly).

Newcal's first proposed market is the interbrand market for Copier Equipment. Newcal, however, fails to allege that IKON enjoys market power in the interbrand market for Copier Equipment. Moreover, its pleadings make clear that Newcal is basing its allegations upon the second, third, and fourth markets proposed by plaintiff, which are all limited to customers that have contracts with IKON. *See, e.g.*, Compl. at ¶ 57 (alleging unreasonable restraint of trade in the "market for replacement, upgrade, or addition of Copier Equipment in the significant installed equipment base of IKON"); ¶ 58 (alleging unreasonable restraint of trade in the "market for the sale of service, parts and supplies to the significant installed base of IKON"); ¶ 69 (alleging harm to competition in the "market to supply parts and service to IKON and IOS Capital customers'); ¶ 70 (alleging harm to competition in the market to provide "Copier Equipment to their existing IKON Contract customers.").

IKON argues, and this Court agrees, that a relevant market based on IKON customers that have contracts with IKON is not permitted under antitrust law. In *Queen City Pizza*, the Third Circuit rejected plaintiffs' attempt to limit the relevant product market to Domino's approved ingredients and supplies that plaintiff franchisees were required to buy under their franchise agreement. As stated by that court, "[a] court making a relevant market determination looks not to the contractual constraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." *Id.* at 438. The *Queen City Pizza* court found that the relevant market in that case

must also include the "dough, sauce and cups available from other suppliers and used by other pizza companies," reasoning that the only difference between these and Domino's approved products is that Domino's franchisees cannot use the former without violating their franchise agreement. *Id.*

Newcal argues that *Queen City Pizza* is not analogous to the case at hand because, in that case, "competition occurred before the franchise contract was signed and this competition disciplined the franchisor's ability to exploit any subsequent market power." In the present case, Newcal argues, there was not unrestrained competition because the contract amendments were obtained by fraud and customers did not know that the agreements they signed purported to extend their contract terms. The Court disagrees and finds *Queen City Pizza* to be very analogous. As in that case, customers of IKON could have chosen one of any number of competing companies to contract with for the Copier Equipment they needed. The Copier Equipment offered by IKON is interchangeable with the Copier Equipment offered by Newcal. Only their contracts with IKON prevent IKON customers from contracting with another company for the same Copier Equipment. Following the teaching of *Queen City Pizza*, the relevant market in this case must also include the "reasonably interchangeable" Copier Equipment offered by IKON competitors. *Id.* at 438.

Other circuit courts have also rejected attempts by plaintiffs to define relevant markets in terms of customers under contract. In *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), the Ninth Circuit rejected the plaintiffs' attempt to limit the relevant market to the acute care hospitals that the insureds used because of contractual provisions in their insurance policies. As

the Court stated, "[t]his tie-in defeats the plaintiffs' argument for a submarket consisting only of those hospitals Humana insureds actually used. To succeed in the face of the contractual tie-in created by the insurance policies, the plaintiffs would have to make a showing of monopoly power in the health insurance market, and there is no evidence of this." *Id.* at 1476 (citations omitted). In *Hack*, the Second Circuit rejected plaintiff's effort to define the relevant market based on "a contractually created class of customers: unmarried freshmen and sophomores below the age of 21." 237 F.3d at 85. The Court held that "[e]conomic power derived from contractual arrangements affecting a distinct class of customers cannot serve as a basis for a monopolization claim." *Id.* (citations omitted).

Newcal also argues that *Eastman Kodak*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265, is controlling and compels us to deny IKON's motion to dismiss. Newcal cites that case to stand for the proposition that a relevant product may be defined by the customers of a single company. *Eastman Kodak*, however, does not go so far in its holding. The Supreme Court states that "in some instances one brand *of a product* can constitute a separate market," *Id.* at 481-482 (emphasis added), and the Court finds that the market for unique replacement parts of Kodak-brand copier machines might be such an instance. In this case, however, IKON customers are not required to buy from IKON because of any unique product over which IKON has exclusive control. *Cf. Queen City Pizza* at 439. Rather, they continue to buy from IKON because of contracts that they signed, whether they be the original IKON Contracts or amendments thereto. It is the contract itself that requires them to be customers of IKON rather than the market power of IKON over any product or service.

This is a critical distinction between *Eastman Kodak* and the present case.

Newcal argues that this case is analogous to *Eastman Kodak* because customers of IKON face "switching" and "information" costs akin to those faced by Kodak customers. In particular, Newcal alleges that after IKON customers become subject to amendments that lengthen their contracts, allegedly through fraud and other legally improper practices of IKON, the costs of switching to other service providers become very high. Newcal also alleges that customers do not have the information to assess the lifetime cost of buying and servicing equipment sold by IKON because they are unaware of the costs imposed by IKON's allegedly fraudulent and otherwise legally improper practices. As explained by the *Queen City Pizza* court, however, "switching and information costs alone cannot create market power." *Queen City Pizza* at 440, n. 10. That court understood, as this Court does, that "it is the lack of a competitive market—for instance, a competitive market in Kodak parts—that gives a company market power." *Id.* IKON, unlike Kodak, does not have market power over a unique product or service that its customers require.

The fraud allegations made by Newcal sound in contract law rather than antitrust law. Similar to *Queen City Pizza*, IKON's ability to block its customers from buying Copier Equipment "stemmed from its exercise of contractual powers, not market power, and the remedy for this problem lies, if at all, under contract law." *Queen City Pizza* at 441. Newcal points out that it cannot pursue these fraud claims directly because the alleged fraud was against IKON customers rather than IKON competitors. It does not follow, however, that Newcal can use these fraud claims to transform what

otherwise would be an invalid relevant product market under antitrust law into a valid one.

B. Other Federal Claims

Newcal also sets forth claims for relief under the Lanham Act, RICO, and the Declaratory Judgments Act. For the reasons set forth below, these claims must also be dismissed.

Lanham Act

In its seventh claim for relief, Newcal alleges that IKON violated the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), which prohibits false and misleading statements in commercial advertising or promotion. A prima facie case in a false advertising claim under the Lanham Act requires a showing that: (1) the defendant made a false statement of fact either about the plaintiff's or its own product; (2) the statement was made in a commercial advertisement or promotion; (3) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (4) the deception is material, in that it is likely to influence the purchasing decision; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 n. 4 (9th Cir. 2002).

Newcal fails to allege a false statement by IKON that is actionable under the Lanham Act. Several of the false representations cited in its complaint constitute "puffing" that is not actionable under the Lanham Act. *See Cook, Perkiss, and Liehe, Inc. v. N. Cal. Col-*

lection Service, Inc., 911 F.2d 242, 245-247 (9th Cir. 2000). The only allegedly false statement that does not qualify as "puffing" is IKON's statement to its prospective customers that the original IKON Contract would last for a fixed period, usually 60 months. As admitted by IKON in its pleadings, however, the statement was true with respect to the contracts when entered: original IKON contracts generally had a term of 60 months. Compl. at 1. The Court also observed that Newcal has not alleged facts showing that IKON's statements were made in "commercial advertisement or promotion" rather than directly to individual prospective customers. For these reasons, Newcal fails to state a claim under the Lanham Act.

RICO

In its eighth claim for relief, Newcal alleges that IKON violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 et seq., by engaging in a pattern of racketeering activity that consisted of repeated acts of mail and wire fraud relating to the amendment of IKON contracts. Liability under RICO, 18 U.S.C. § 1962(c), requires (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996), "Racketeering activity" is any act indictable under several provisions of U.S.C. Title 18, including the predicate acts alleged in this case, mail fraud and wire fraud. *Id.* To properly plead a violation of the mail fraud statute (18 U.S.C. § 1341), a plaintiff must show that: 1) the defendants formed a scheme or artifice to defraud; 2) the defendants used the United States mails in furtherance of the scheme; and 3) the defendants did so with the specific intent to deceive or defraud. *See Schreiber Distrib. Co. v. Serv-Well Furni-*

ture Co., 806 F.2d 1393, 1399-1400 (9th Cir. 1986). Pleading a violation of the wire fraud statute (18 U.S.C. § 1343) differs only in that instead of use of the mails the defendants used the United States wires.

IKON argues that Newcal has not met Federal Rule of Civil Procedure 9(b)'s heightened pleading standard for fraud. Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation. *Miscellaneous Service Workers, etc. v. Philco-Ford Corp.*, WDL Div., 661 F.2d 776, 782 (9th Cir. 1981). Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

The Court finds that Newcal's allegations have not been set forth with sufficient particularity. Newcal provides examples of companies that have been allegedly harmed by IKON's contract amendment practices, but it does not adequately specify the date, time, and place of the alleged wrongful conduct nor explain how the alleged conduct constituted mail or wire fraud. The Declaration of James A. Hennefer and Offer of Proof that was submitted with Newcal's opposition papers is beyond the bounds of this Rule 12(b)(6) motion. Even if it were considered to be part of the pleadings, however, it would not be sufficient to cure the deficiencies. Should Newcal choose to amend its claim for relief under RICO, a RICO Statement should be filed that con-

forms to the "Order Requiring Filing of RICO Statement" appended to this order.

Declaratory Judgment Act

Newcal's ninth claim is against IKON and GE Capital for Declaratory Relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq. Defendant GE Capital filed a separate motion to dismiss this claim, which was joined by IKON.

In its complaint, Newcal requests declaratory relief concerning the following issues: (1) that the original IKON contracts which were procured under false and fraudulent circumstances are voidable and not enforceable; (2) that the non-flex portion of amendments to IKON contracts are voidable and not enforceable; (3) that the IKON contracts that have been flexed using improper techniques are voidable and not enforceable; (4) that the "buy-out" and "lease-end" practices are not lawful; and (5) that defendants use of different entities for selling and administering financing leases to avoid lending and disclosure laws is unlawful. Newcal thus requests this Court to declare certain IKON Contracts invalid and certain IKON actions taken pursuant to its contracts unlawful.

The Declaratory Judgment Act permits a federal court to "declare the rights and other legal relations" of parties to "a case of actual controversy." *Societe de Conditionnement en Aluminum v. Hunter Engineering Co.*, 655 F.2d 938, 942 (9th Cir. 1981), citing 28 U.S.C. § 2201. As explained by the Ninth Circuit,

> The Declaratory Judgment Act embraces both constitutional and prudential concerns. A lawsuit seeking federal declaratory relief must first present an actual case or controversy

> within the meaning of Article III, section 2 of the United States Constitution. It must also fulfill statutory jurisdictional prerequisites. If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate. This determination is discretionary, for the Declaratory Judgment Act is "deliberately cast in terms of permissive, rather than mandatory, authority." The Act "gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Government Emples. Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (citations and footnotes omitted)

GE Capital argues that Newcal lacks Article III standing because it is not a party to the contracts it seeks declared invalid and its stake in the controversy is merely speculative. GE Capital further argues that even if Newcal has standing, the court should exercise its discretion under the Declaratory Judgment Act to deny declaratory relief because it would not definitively settle any legal relations or rights of lease customers who are not before the court. Newcal asserts that there is a live controversy and that it has adverse legal interests based on a threat of "legal action" that IKON made against Newcal for "interfering with its [IKON's] existing and potential business relationships." Compl. ¶ 116. Newcal further argues that the Court should exercise its discretion to hear the claim for declaratory relief.

Defendants argue, and the Court agrees, that Newcal lacks standing to seek declaratory judgment regarding the rights and obligations of customers subject to IKON Contracts. Newcal is not a party to the IKON Contracts, but rather seeks to assert the legal

interests of the third party IKON customers. In cases in which plaintiffs have sought declarations regarding rights and obligation under a contract to which it is not a party, other district courts have similarly found deficiencies in standing. *See, e.g., Douglas v. Don King Productions, Inc.*, 736 F.Supp. 223 (D. Nev. 1990) (dismissing a declaratory relief plaintiff that was not party to a contract that it sought to be declared invalid); *Meyer Mfg. Co. v. Cuisine Ware, Inc.*, 1987 U.S. Dist. LEXIS 209 (N.D. Ill. 1987) (dismissing declaratory relief claim where plaintiff was not a party to the contract that it requested the court to void). Newcal argues that it has standing based upon IKON's June 18, 2004 threat of legal action against Newcal for "interfering with its [IKON's] existing and potential business relationships" is not well-taken. The basis of Newcal's complaint, however, seeks declaratory relief relating to the legality of IKON's contracts with its customers, contracts to which Newcal is not a party.

Even if Newcal could amend its complaint in such a way as to have standing, prudential considerations would counsel against the granting of declaratory relief in this action. As the Ninth Circuit has stated, "declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985). In the present action, a sweeping declaration by the Court cannot resolve the legitimacy of all the separate IKON contracts that could be subject to such a declaration. Because the IKON customers under such contracts are not parties to this case, such a declaration would not clarify or settle the legal relations in issue nor afford relief from the

uncertainty faced by the parties. *See Delno v. Market St. R. Co.*, 124 F.2d 965, 968-69 (9th Cir. 1942) (affirming dismissal of declaratory relief claim where such relief would not finally settle the issue because absent parties would have the right to litigate the same question).

A district court has discretion to deny leave to amend where the amendment would be futile. *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991). "If the district court determines that the 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency,' then the dismissal without leave to amend is proper." *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)) (internal citations omitted). In this case, any amendment would fail to cure the deficiencies in Newcal's claim for declaratory relief and would thus be futile.

C. State Law Claims

Newcal's remaining claims, for tortious interference and violations of the California Business and Professions Code, are state law claims. Because this Court has only supplemental jurisdiction over these claims and believes that they would be resolved most efficiently in a state court, Newcal's state law claims are hereby dismissed. 28 U.S.C. § 1367(c)(3); *Levald Inc. v. City of Palm Desert*, 998 F.2d 680, 692 (9th Cir. 1993), cert. denied, 510 U.S. 1093, 114 S. Ct. 924, 127 L. Ed. 2d 217 (1994).

CONCLUSION

For the reasons stated above, IKON and GE Capital's motions to dismiss are GRANTED. Newcal, how-

ever, requests the Court for leave to amend the complaint to cure any infirmities. The Court has serious doubts about whether Newcal can amend its complaint to define a relevant market and to address the other pleading defects, but in order to give Newcal every opportunity, the Court GRANTS Newcal leave to amend its complaint on all claims except its declaratory relief claim. The Court's Order Requiring Filing of Rico Statement is attached and incorporated by reference.

IT IS SO ORDERED.

ORDER REQUIRING FILING OF RICO STATEMENT

In this action, claims have been asserted under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. Under the current practice of this Judge, all parties filing RICO claims must file a RICO statement in the form following.

The plaintiff shall file, within thirty (30) days hereof, a RICO case statement. This statement shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed.R.Civ.P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information;

a. List the alleged predicate acts and the specific statutes which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise; and

b. State whether the same entity is both the liable "person" and the enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained for which each defendant is allegedly liable.

18. List al other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the court in processing your RICO claim.

SO ORDERED.

APPENDIX E

STATUTORY PROVISIONS

Sherman Act § 1, 2, 15 U.S.C. § 1, 2

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to ob-

struction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works),

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[1] So in original.

section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is en-

gaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Declaratory Judgment Act, 28 U.S.C. § 2201

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.